UNITED STATES REPORTS

VOLUME 458

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1981

JUNE 28 THROUGH SEPTEMBER 20, 1982
TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS
END OF TERM

HENRY C. LIND
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1985

KF
101
.U53
1981
no. 458

ERRATA

423 U. S. 1040, line 3: "p. II" should be "p. VI."
454 U. S. 808, line 7: "p. II" should be "p. IV."

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

GL Stacks
Depos U.S.A
8-6-85

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

RETIRED

POTTER STEWART, Associate Justice.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
REX E. LEE, Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

(For next previous allotment, see 423 U. S., p. VI.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1976 edition.

Cases reported before page 1101 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1101 *et seq.* are those in which orders were entered. Opinions reported on page 1301 *et seq.* are those written in chambers by individual Justices.

Page
Abbott & Associates, Inc.; Illinois *v.* 1103
ABC Containerline, N.V. *v.* Kingston Shipping Co. 1108
Adams *v.* Howerton 1111
Advance Ross Electronics Corp. *v.* Green 1108
Aetna Ins. Co.; Roy Wilt & Son *v.* 1108
Aetna Ins. Co.; Wilt *v.* 1108
Ahmed *v.* Eikerenkoetter 1116
Akron *v.* Akron Center for Reproductive Health, Inc. 1104
Akron; Akron Center for Reproductive Health, Inc. *v.* 1104
Akron Center for Reproductive Health, Inc. *v.* Akron 1104
Akron Center for Reproductive Health, Inc.; Akron *v.* 1104
Alabama *v.* Graddick 1106
Alexander; McDonald *v.* 1124
Alfred L. Snapp & Son, Inc. *v.* Puerto Rico *ex rel.* Barez 592
Allied International, Inc. *v.* Longshoremen 1120
American Consulting Assn., Inc.; J & M Design Co. *v.* 1112
American Consulting Assn., Inc.; Spencer *v.* 1112
American Laundry Press Co. *v.* OK NYO Rexrode 1103
American Society of Mechanical Engineers *v.* Hydrolevel Corp. .. 1116
Anderson *v.* Flateau 1123
Andrews *v.* United States 1108
Arkansas *v.* Mississippi 1119,1122
Arthur Treacher's Fish & Chips, Inc. *v.* Horstmyer 1107
Arthur Young & Co. *v.* Summer 1106
ASARCO Inc. *v.* Idaho State Tax Comm'n 307
Ashcroft *v.* National Organization for Women, Inc. 1102
Ashcroft *v.* Planned Parenthood Assn. of Kansas City 1104
Ashcroft; Planned Parenthood Assn. of Kansas City *v.* 1104
Associated General Contractors of California, Inc. *v.* Carpenters 1128

Page
Attorney General *v.* Black Panther Party 1118
Attorney General; Reynolds *v.* 1110
Attorney General; Sporhase *v.* 941
Attorney General; Weigang *v.* 1103
Attorney General of Mich.; Lake Carriers' Assn. *v.* 1116
Attorney General of Mo. *v.* National Organization for Women, Inc. . 1102
Attorney General of Mo. *v.* Planned Parenthood Assn. of K. C. .. 1104
Attorney General of Mo.; Planned Parenthood Assn. of K. C. *v.* .. 1104
Baker *v.* Zant 1115
Barez; Alfred L. Snapp & Son, Inc. *v.* 613
Barez; Bramkamp *v.* 1121
Bearden *v.* Georgia 1105
Bechtel Power Corp. *v.* Pennsylvania 375
Beltran *v.* Smith 1303
Berger *v.* United States 1132
Binkley Co.; Williams Enterprises, Inc. *v.* 1107
Black *v.* East Ohio Gas Co. 1132
Blackburn; Wilkerson *v.* 1105,1131
Black Panther Party; Moore *v.* 1118
Black Panther Party; Smith *v.* 1118
Board of Ed., Hendrick Hudson Central School Dist. *v.* Rowley .. 176
Board of Ed. of Los Angeles; Crawford *v.* 527
Board of Ed. of Rogers, Ark. *v.* McCluskey 966,1132
Board of Governors, FRS; Option Advisory Service, Inc. *v.* 1108
Board of Trustees of Insts. of Higher Ed. *v.* Miss. Council on H. R. 1116
Boehm, *In re* 1125
Bohemian Distributing Co. *v.* Norman Williams Co. 654
Bonds, *In re* 1127
Bramkamp *v.* Puerto Rico *ex rel.* Barez 1121
Brewer *v.* Indiana 1122,1132
Brisbois, *In re* 1127
Bronze Shields, Inc. *v.* New Jersey Dept. of Civil Service 1122
Buchanan; Kallenberger *v.* 1124
Bullard; Estelle *v.* 1120
Bureau of Revenue of N. M.; Ramah Navajo School Bd., Inc. *v.* .. 832
Burlington Northern R. Co.; Tatum *v.* 1111
Burroughs Corp.; Kramarsky *v.* 1130
Bush *v.* Lucas 1104
Butcher *v.* United States 1133
California *v.* Glendale Federal Savings & Loan Assn. 1121
California; Romano *v.* 1109
California *v.* Shirley 1125
California *v.* Texas 1119,1131
California; Villareal *v.* 1109

Page
California *ex rel.* State Lands Comm'n *v.* United States 1131
California Federal Savings & Loan Assn. *v.* Romagnoli 1117
California Federal Savings & Loan Assn. *v.* Tan 1117
Campbell, *In re* 1133
Campbell *v.* Civiletti 1116
Capps *v.* New Mexico 1107
Carpenters; Associated General Contractors of California, Inc. *v.* 1128
Carpentersville; Fiala *v.* 1132
Carter *v.* Dayton Bd. of Ed. 1131
Casari *v.* First Federal Savings & Loan Assn. of Lincoln 1106
Certain Named & Unnamed Undocumented Alien Children; Texas *v.* 1131
Chadha; Immigration and Naturalization Service *v.* 1120
Chaney *v.* Warden 1116
Chastain *v.* Davis 1118
Chemical Construction Corp.; Kremer *v.* 1133
City. See name of city.
Civiletti; Campbell *v.* 1116
Claiborne Hardware Co.; NAACP *v.* 886
Clements *v.* Fashing 1133
Click *v.* Idaho *ex rel.* Evans 1131
Collins; Hunt *v.* 1132
Combs *v.* United States 1111
Commissioner; Sutain *v.* 1110,1133
Commissioner of Internal Revenue. See Commissioner.
Commodity Futures Trading Comm'n; Monex International Ltd. *v.* 1103
Commonwealth. See name of Commonwealth.
Connecticut; Frazier *v.* 1112
Connick *v.* Myers 1130
Container Corp. of America *v.* Franchise Tax Bd. 1129
Contractors Assn. of Eastern Pennsylvania *v.* Pennsylvania 375
Cook *v.* United States 1116
Coppola; Mitchell *v.* 1123
Corriz; Naranjo *v.* 1123
Corsetti *v.* Massachusetts 1306
County. See name of county.
Coward *v.* United States 1116
Crawford *v.* Board of Ed. of Los Angeles 527
Davis; Chastain *v.* 1118
Dawson *v.* New York 1112
Dayton Bd. of Ed.; Carter *v.* 1131
De la Cuesta; Fidelity Federal Savings & Loan Assn. *v.* 141
Delaware; Doe *v.* 1117
Delaware Valley Citizens' Council for Clean Air; Pennsylvania *v.* 1125
Delta Air Lines, Inc.; Kramarsky *v.* 1130

Page
Delta Air Lines, Inc.; Pfister *v.* 1124
Devine *v.* Illinois 1109
Director, OWCP *v.* Perini North River Associates 1129
Director of penal or correctional institution. See name or title of director.
District Court of Colo., Seventeenth Judicial Dist. *v.* Marks 1107
District Judge. See U. S. District Judge.
District of Columbia Court of Appeals *v.* Feldman 1105
District of Columbia Court of Appeals; Feldman *v.* 1106
District of Columbia Court of Appeals; Hickey *v.* 1106
Doe *v.* Delaware 1117
Doe; Plyler *v.* 1131
Douglas; Sporhase *v.* 941
Dykema *v.* United States 1132
East Ohio Gas Co.; Black *v.* 1132
Eikerenkoetter; Ahmed *v.* 1116
Electrical Workers; Lord *v.* 1106
Enmund *v.* Florida 782
Equal Employment Opportunity Comm'n; Ford Motor Co. *v.* 219
Estelle *v.* Bullard 1120
Estelle *v.* Moore 1111
Estelle; Norris *v.* 1109
Estelle *v.* Von Burleson 1121
Etlin *v.* Robb 1112
Evans; Click *v.* 1131
Fannon *v.* Florida 1107
Fashing; Clements *v.* 1133
Federal Election Comm'n *v.* National Right to Work Committee 1130
Federal Energy Regulatory Comm'n; Harvey *v.* 1132
Federal Energy Regulatory Comm'n *v.* Mississippi 1131
Federal Home Loan Bank Bd. *v.* Gulf Federal S. & L. Assn. 1121
Feldman, *In re* 1125
Feldman *v.* District of Columbia Court of Appeals 1106
Feldman; District of Columbia Court of Appeals *v.* 1105
Fendler, *In re* 1128
Ferber; New York *v.* 747
Fernandes; Limmer *v.* 1124
Fiala *v.* Carpentersville 1132
Fidelity Federal Savings & Loan Assn. *v.* De la Cuesta 141
First Federal Savings & Loan Assn. of Lincoln; Casari *v.* 1106
First Pennsylvania Bank N. A. *v.* Zeffiro 1131
First Tennessee Bank N. A. Memphis; Smith *v.* 1105
First Tennessee Bank N. A. Memphis; Sullivan *v.* 1105
Fishman, *In re* 1126

Page
Flateau; Anderson *v.* 1123
Florida; Enmund *v.* 782
Florida; Fannon *v.* 1107
Florida; Francois *v.* 1122
Florida; Messer *v.* 1116
Florida; Sireci *v.* 1116
Florida; White *v.* 1301
Florida Dept. of Labor and Employment Security; Paschal *v.* 1116
Florida Dept. of State *v.* Treasure Salvors, Inc. 670
Florida Public Employees Relations Comm'n; Paschal *v.* 1132
Ford *v.* Kentucky 1103
Ford Motor Co. *v.* Equal Employment Opportunity Comm'n 219
Fox; Glendale Federal Savings & Loan Assn. *v.* 1121
Franchise Tax Bd.; Container Corp. of America *v.* 1129
Francois *v.* Florida 1122
Frazier *v.* Connecticut 1112
F. W. Woolworth Co. *v.* Taxation and Revenue Dept. of N. M. 354
Garner; Memphis Bank & Trust Co. *v.* 1131
Gates; Illinois *v.* 1127
Gault *v.* United States 1109
General Building Contractors Assn., Inc. *v.* Pennsylvania 375
Georgia; Bearden *v.* 1105
Georgia; Gilreath *v.* 1116
Gillespie; United States *v.* 1111
Gillette Co. *v.* Miner 1130
Gilman Paper Co.; Wilder *v.* 1107
Gilmore *v.* Pennsylvania 1103
Gilreath *v.* Georgia 1116
Glasgow, Inc. *v.* Pennsylvania 375
Glendale Federal Savings & Loan Assn.; California *v.* 1121
Glendale Federal Savings & Loan Assn. *v.* Fox 1121
Glendale Federal Savings & Loan Assn. *v.* Gross 1117
Glendale Federal Savings & Loan Assn. *v.* Hehir 1117
Gloeckner, *In re* 1127
Glover-El *v.* Illinois 1110
Goldfarb *v.* United States 1108
Governor of Idaho; Click *v.* 1131
Governor of Tenn.; McDonald *v.* 1124
Governor of Tex. *v.* Fashing 1133
Governor of Va.; Etlin *v.* 1112
Grace; Springdale School Dist. No. 50 of Washington County *v.* 1118
Grace & Co. *v.* Rubber Workers 1105
Graddick; Alabama *v.* 1106
Graham *v.* New York 1101

Page
Green; Advance Ross Electronics Corp. *v.* 1108
Griffin *v.* Oceanic Contractors, Inc. 564
Gross; Glendale Federal Savings & Loan Assn. *v.* 1117
Guice, *In re* 1104
Gulf Federal S. & L. Assn.; Federal Home Loan Bank Bd. *v.* 1121
Hale *v.* United States 1124
Hammersmith, *In re* 1126
Hampton Roads Shipping Assn. *v.* Longshoremen 1105
Harrington *v.* Tennesse 1132
Harris *v.* Housewright 1110
Harris County; Xerox Corp. *v.* 1130
Harvey *v.* Federal Energy Regulatory Comm'n 1132
Hathorn *v.* Lovorn 1131
Hehir; Glendale Federal Savings & Loan Assn. *v.* 1117
Herman & McLean *v.* Huddleston 1129
Hickey *v.* District of Columbia Court of Appeals 1106
Hogan; Mississippi Univ. for Women *v.* 718
Hogan *v.* Pennsylvania 1110
Holland, *In re* 1104
Hollywood Motor Car Co.; United States *v.* 263
Hondo Boats, Inc. *v.* McCraine 1105
Hood *v.* United States 1109
Hoover *v.* Mississippi 1132
Horizons Apartments Associates, Ltd. *v.* Lee County 1124
Horstmyer; Arthur Treacher's Fish & Chips, Inc. *v.* 1107
Housewright; Harris *v.* 1110
Howard *v.* New Jersey Dept. of Civil Service 1122
Howell *v.* Steffey 1110
Howerton; Adams *v.* 1111
Huddleston; Herman & McLean *v.* 1129
Huey *v.* Teledyne, Inc. 1106
Hunt *v.* Collins 1132
Hydrolevel Corp.; American Society of Mechanical Engineers *v.* .. 1116
Hyman *v.* South Carolina 1122,1132
Idaho *ex rel.* Evans; Click *v.* 1131
Idaho State Tax Comm'n; ASARCO Inc. *v.* 307
Ieva *v.* Stamford 1106
Ieva; Stamford *v.* 1106
Illinois *v.* Abbott & Associates, Inc. 1103
Illinois; Devine *v.* 1109
Illinois *v.* Gates 1127
Illinois; Glover-El *v.* 1110
Illinois; Thompson *v.* 1109
Immigration and Naturalization Service *v.* Chadha 1120

Page
Immigration and Naturalization Service; U. S. House of Reps. *v.* 1120
Immigration and Naturalization Service; U. S. Senate *v.* 1120
Indiana; Brewer *v.* 1122,1132
Ingram *v.* Smith 1110
In re. See name of party.
Insurance Comm'r of N. H.; Sharon Steel Corp. *v.* 1101
International. For labor union, see name of trade.
Iron Arrow Honor Society *v.* Schweiker 1102
Irwin *v.* Montgomery County 1106
Jackson *v.* Leeke 1110
Jim McNeff, Inc. *v.* Todd 1120
J & M Design Co. *v.* American Consulting Assn., Inc. 1112
Johnson *v.* Johnson 1107
Johnson; Mariscal *v.* 1112
J. P. Stevens & Co. *v.* National Labor Relations Bd. 1118
Kallenberger *v.* Buchanan 1124
Kelley; Lake Carriers' Assn. *v.* 1116
Kelly *v.* United States 1109
Kentucky; Ford *v.* 1103
Kingston Shipping Co.; ABC Containerline, N.V. *v.* 1108
Klein; Rennie *v.* 1119
Kramarsky *v.* Burroughs Corp. 1130
Kramarsky *v.* Delta Air Lines, Inc. 1130
Kramarsky *v.* Metropolitan Life Ins. Co. 1130
Kremer *v.* Chemical Construction Corp. 1133
Kulwiec, *In re* 1104,1133
Kush *v.* Rutledge 1120
Labor Union. See name of trade.
Lake Carriers' Assn. *v.* Kelley 1116
Land & Leisure, Inc. *v.* Summer 1106
Langkam, *In re* 1125
Lawrence, on behalf of Coppola; Mitchell *v.* 1123
Lee County; Horizons Apartments Associates, Ltd. *v.* 1124
Leeke; Jackson *v.* 1110
Lehman *v.* Lycoming County Children's Services Agency 502
Leighton; Wright *v.* 1116
Levine, *In re* 1126
Lieberman, *In re* 1127
Limmer *v.* Fernandes 1124
Limmer *v.* Santani 1124
Local. For labor union, see name of trade.
Lodge; Rogers *v.* 613
Longshoremen; Allied International, Inc. *v.* 1120
Longshoremen; Hampton Roads Shipping Assn. *v.* 1105

Page
Longval; Meachum *v.* 1102
Lord *v.* Electrical Workers 1106
Loretto *v.* Teleprompter Manhattan CATV Corp. 419
Lovorn; Hathorn *v.* 1131
Lucas; Bush *v.* 1104
Lycoming County Children's Services Agency; Lehman *v.* 502
Marathon Pipe Line Co.; Northern Pipeline Construction Co. *v.* 50
Marathon Pipe Line Co.; United States *v.* 50
Marinello *v.* New York City 1108
Mariscal *v.* Johnson 1112
Marks; District Court of Colo., Seventeenth Judicial Dist. *v.* 1107
Marquez-Amaya; United States *v.* 1118
Maselli *v.* State Bd. of Equalization of Cal. 1132
Massachusetts; Corsetti *v.* 1306
Massachusetts Council of Construction Employers, Inc.; White *v.* 1129
Mayor of Boston *v.* Massachusetts Council of Constr. Employers 1129
Mathis *v.* United States 1116
McAllen Bag & Supply Co.; Vasquez *v.* 1122
McCarthy; United States *ex rel.* Miller *v.* 1109,1132
McCluskey; Board of Ed. of Rogers, Ark. *v.* 966,1132
McCraine; Hondo Boats, Inc. *v.* 1105
McDonald *v.* Alexander 1124
McGraw-Edison Co. *v.* Sikes 1108
McNeff, Inc. *v.* Todd 1120
Meachum *v.* Longval 1102
Memphis Bank & Trust Co. *v.* Garner 1131
Messer *v.* Florida 1116
Metropolitan Edison Co. *v.* People Against Nuclear Energy 1128
Metropolitan Life Ins. Co.; Kramarsky *v.* 1130
Michigan *v.* Thomas 259
Michigan; Yeo *v.* 1132
Miller *v.* McCarthy 1109,1132
Miller *v.* New York 1102
Miller *v.* United States 1110
Miner; Gillette Co. *v.* 1130
Mississippi; Arkansas *v.* 1119,1122
Mississippi; Federal Energy Regulatory Comm'n *v.* 1131
Mississippi; Hoover *v.* 1132
Mississippi Council on Hum. Rel.; Trustees of Insts. of Higher Ed. *v.* 1116
Mississippi Univ. for Women *v.* Hogan 718
Mitchell *v.* Lawrence, on behalf of Coppola 1123
Monex International Ltd. *v.* Commodity Futures Trading Comm'n 1103
Montgomery *v.* United States 1116
Montgomery County; Irwin *v.* 1106

	Page
Moore *v.* Black Panther Party	1118
Moore; Estelle *v.*	1111
Moreau; Oppenheim *v.*	1107
Moreno; Toll *v.*	1
Morgan Drive Away, Inc. *v.* Samford	1122
Morris *v.* Slappy	1103
Morrow; Thompson *v.*	1116
Myers; Connick *v.*	1130
Nadel, *In re*	1126
Nadler, *In re*	1127
Naranjo *v.* Corriz	1123
NAACP *v.* Claiborne Hardware Co.	886
National Black Police Assn., Inc.; Velde *v.*	591
National Broadcasting Co.; Niemi *v.*	1108,1132
National Labor Relations Bd.; J. P. Stevens & Co. *v.*	1118
National Labor Relations Bd.; Shepard *v.*	1131
National Organization for Women, Inc.; Ashcroft *v.*	1102
National Right to Work Committee; Federal Election Comm'n *v.*	1130
Nebeker *v.* United States	1111
Nebraska; South Dakota *v.*	276
Nebraska *ex rel.* Douglas; Sporhase *v.*	941
Neustein *v.* United States	1132
New Jersey Dept. of Civil Service; Bronze Shields, Inc. *v.*	1122
New Jersey Dept. of Civil Service; Howard *v.*	1122
New Mexico; Capps *v.*	1107
New Mexico; Stevens *v.*	1109
New York; Dawson *v.*	1112
New York *v.* Ferber	747
New York; Graham *v.*	1101
New York; Miller *v.*	1102
New York City; Marinello *v.*	1108
New York Shipping Assn. *v.* Waterfront Comm'n of N. Y. Harbor	1101
New York State Chiropractic Assn. *v.* Pireno	119
Niemi *v.* National Broadcasting Co.	1108,1132
Nieves *v.* United States	1132
Norman Williams Co.; Bohemian Distributing Co. *v.*	654
Norman Williams Co.; Rice *v.*	654
Norman Williams Co.; Wine & Spirits Wholesalers of California *v.*	654
Norris *v.* Estelle	1109
North Dakota *v.* United States	1129
Northern Pipeline Construction Co. *v.* Marathon Pipe Line Co.	50
Northwestern Bell Telephone Co.; Occhino *v.*	1133
Occhino *v.* Northwestern Bell Telephone Co.	1133
Oceanic Contractors, Inc.; Griffin *v.*	564

Page
Ohio; Scott *v.* 1108
OK NYO Rexrode; American Laundry Press Co. *v.* 1103
Olson; Smith *v.* 1125
Olson *v.* United States 1110
Oppenheim *v.* Moreau 1107
Option Advisory Service, Inc. *v.* Board of Governors, FRS 1108
Paglianite, *In re* 1125
Pan American Savings & Loan Assn. *v.* Panko 1117
Panko; Pan American Savings & Loan Assn. *v.* 1117
Panzirer; Price Waterhouse *v.* 1105
Panzirer *v.* Wolf 1107
Paschal *v.* Florida Dept. of Labor and Employment Security 1116
Paschal *v.* Florida Public Employees Relations Comm'n 1132
Pennsylvania; Bechtel Power Corp. *v.* 375
Pennsylvania; Contractors Assn. of Eastern Pennsylvania *v.* 375
Pennsylvania *v.* Delaware Valley Citizens' Council for Clean Air 1125
Pennsylvania; General Building Contractors Assn., Inc. *v.* 375
Pennsylvania; Gilmore *v.* 1103
Pennsylvania; Glasgow, Inc. *v.* 375
Pennsylvania; Hogan *v.* 1110
Pennsylvania; Porter *v.* 1121
Pennsylvania; United Engineers & Constructors, Inc. *v.* 375
People Against Nuclear Energy; Metropolitan Edison Co. *v.* 1128
Pepsi-Cola Bottling Co. of St. Louis, Mo.; Williams *v.* 1133
Perini North River Associates; Director, OWCP *v.* 1129
Perry *v.* Perry 1109
Pfister *v.* Delta Air Lines, Inc. 1124
Pireno; New York State Chiropractic Assn. *v.* 119
Pireno; Union Labor Life Ins. Co. *v.* 119
Planned Parenthood Assn. of Kansas City *v.* Ashcroft 1104
Planned Parenthood Assn. of Kansas City; Ashcroft *v.* 1104
Plante *v.* Scott 1101
Plyler *v.* Doe 1131
Pope *v.* United States 1110
Porter *v.* Pennsylvania 1121
Price Waterhouse *v.* Panzirer 1105
Puerto Rico *ex rel.* Barez; Alfred L. Snapp & Son, Inc. *v.* 592
Puerto Rico *ex rel.* Barez; Bramkamp *v.* 1121
Quiros *v.* United States 1111
Ramah Navajo School Bd., Inc. *v.* Bureau of Revenue of N. M. 832
Raymond, James & Associates, Inc. *v.* Summer 1106
Rennie *v.* Klein 1119
Resnick, *In re* 1125
Reynolds *v.* Attorney General 1110

Page
Rheaume *v.* Saffell 1106
Rice *v.* Norman Williams Co. 654
Rice *v.* United States 1111
Ritter *v.* Ritter 1132
Robb; Etlin *v.* 1112
Rogers *v.* Lodge 613
Romagnoli; California Federal Savings & Loan Assn. *v.* 1117
Romano *v.* California 1109
Rowley; Board of Ed., Hendrick Hudson Central School Dist. *v.* 176
Roy Wilt & Son *v.* Aetna Ins. Co. 1108
Rubber Workers; W. R. Grace & Co. *v.* 1105
Ruppel *v.* United States 1107,1132
Rutledge; Kush *v.* 1120
Saffell; Rheaume *v.* 1106
Samford; Morgan Drive Away, Inc. *v.* 1122
Sanborn *v.* Wolfel 1102
Sands, *In re* 1126
Santani; Limmer *v.* 1124
Scanlon *v.* Tokarcik 1121
Schweiker; Iron Arrow Honor Society *v.* 1102
Scott *v.* Ohio 1108
Scott; Plante *v.* 1101
Seattle School Dist. No. 1; Washington *v.* 457
Secretary of Health and Human Services; Iron Arrow Honor Soc. *v.* 1102
Secretary of Interior *v.* Western Nuclear, Inc. 1104
Secretary of State of Colo.; Kallenberger *v.* 1124
Shabazz, *In re* 1104
Sharon Steel Corp. *v.* Insurance Comm'r of N. H. 1101
Shepard *v.* National Labor Relations Bd. 1131
Sher; United States *v.* 1121
Shirley; California *v.* 1125
Sholly; U. S. Nuclear Regulatory Comm'n *v.* 1128
Sikes; McGraw-Edison Co. *v.* 1108
Simopoulos *v.* Virginia 1104,1128
Sireci *v.* Florida 1116
Slappy; Morris *v.* 1103
Smith; Beltran *v.* 1303
Smith *v.* Black Panther Party 1118
Smith *v.* First Tennessee Bank N. A. Memphis 1105
Smith; Ingram *v.* 1110
Smith *v.* Olson 1125
Smith *v.* United States 1110
Smith; Weigang *v.* 1103
Snapp & Son, Inc. *v.* Puerto Rico *ex rel.* Barez 592

Page
Snyder *v.* United States 1111
South Carolina; Hyman *v.* 1122,1132
South Dakota *v.* Nebraska 276
Spencer *v.* American Consulting Assn., Inc. 1112
Spiro, *In re* 1128
Spivey; Zant *v.* 1111
Sporhase *v.* Nebraska *ex rel.* Douglas 941
Springdale School Dist. No. 50 of Washington County *v.* Grace 1118
Stamford *v.* Ieva 1106
Stamford; Ieva *v.* 1106
State. See name of State.
State Bd. of Equalization of Cal.; Maselli *v.* 1132
State Lands Comm'n *v.* United States 1131
Steffey; Howell *v.* 1110
Stern, *In re* 1126
Stevens *v.* New Mexico 1109
Stevens & Co. *v.* National Labor Relations Bd. 1118
Stine *v.* United States 1110
Sullivan *v.* First Tennessee Bank N. A. Memphis 1105
Summer; Arthur Young & Co. *v.* 1106
Summer; Land & Leisure, Inc. *v.* 1106
Summer; Raymond, James & Associates, Inc. *v.* 1106
Sundock, *In re* 1128
Superintendent of penal or correctional institution. See name or title of superintendent.
Sutain *v.* Commissioner 1110,1133
Tan; California Federal Savings & Loan Assn. *v.* 1117
Tatum *v.* Burlington Northern R. Co. 1111
Taxation and Revenue Dept. of N. M.; F. W. Woolworth Co. *v.* 354
Teledyne, Inc.; Huey *v.* 1106
Teleprompter Manhattan CATV Corp.; Loretto *v.* 419
Tennessee; Harrington *v.* 1132
Texas; California *v.* 1119,1131
Texas *v.* Certain Named & Unnamed Undocumented Alien Children 1131
Thomas; Michigan *v.* 259
Thomas; Wedra *v.* 1109
Thompson *v.* Illinois 1109
Thompson *v.* Morrow 1116
Thompson *v.* Woltenberg 1132
Todd; Jim McNeff, Inc. *v.* 1120
Tokarcik; Scanlon *v.* 1121
Toll *v.* Moreno 1
Trapp, *In re* 1116
Treacher's Fish & Chips, Inc. *v.* Horstmyer 1107

	Page
Treasure Salvors, Inc.; Florida Dept. of State *v.*	670
Troy *v.* United States	1111
Union. For labor union, see name of trade.	
Union Labor Life Ins. Co. *v.* Pireno	119
United Engineers & Constructors, Inc. *v.* Pennsylvania	375
United States. See name of other party.	
U. S. District Judge; Wright *v.*	1116
United States *ex rel.* Miller *v.* McCarthy	1109,1132
U. S. House of Representatives *v.* INS	1120
U. S. Nuclear Regulatory Comm'n *v.* Sholly	1128
U. S. Senate *v.* INS	1120
Valenzuela-Bernal; United States *v.*	858
Vasquez *v.* McAllen Bag & Supply Co.	1122
Velde *v.* National Black Police Assn., Inc.	591
Village. See name of village.	
Villareal *v.* California	1109
Virginia; Simopoulos *v.*	1104,1128
Virginia; Weisen *v.*	1107
Von Burleson; Estelle *v.*	1121
Wade *v.* United States	1116
Wajert, *In re*	1125
Warden. See also name of warden.	
Warden; Chaney *v.*	1116
Washington *v.* Seattle School Dist. No. 1	457
Waterfront Comm'n of New York Harbor; N. Y. Shipping Assn. *v.*	1101
Watt *v.* Western Nuclear, Inc.	1104
Wedra *v.* Thomas	1109
Weigang, *In re*	1103
Weigang *v.* Smith	1103
Western Nuclear, Inc.; Watt *v.*	1104
White *v.* Florida	1301
White *v.* Massachusetts Council of Construction Employers, Inc.	1129
Wiesen *v.* Virginia	1107
Wilder *v.* Gilman Paper Co.	1107
Wilkerson *v.* Blackburn	1105,1131
Williams *v.* Pepsi-Cola Bottling Co. of St. Louis, Mo.	1133
Williams *v.* United States	279
Williams Co.; Bohemian Distributing Co. *v.*	654
Williams Co.; Rice *v.*	654
Williams Co.; Wine & Spirits Wholesalers of California *v.*	654
Williams Enterprises, Inc. *v.* Binkley Co.	1107
Wilson *v.* Wilson	1107
Wilt *v.* Aetna Ins. Co.	1108
Wilt & Son *v.* Aetna Ins. Co.	1108

	Page
Wine & Spirits Wholesalers of California *v.* Norman Williams Co.	654
Wolf; Panzirer *v.*	1107
Wolfel; Sanborn *v.*	1102
Woltenberg; Thompson *v.*	1132
Woolworth Co. *v.* Taxation and Revenue Dept. of N. M.	354
W. R. Grace & Co. *v.* Rubber Workers	1105
Wright *v.* Leighton	1116
Xerox Corp. *v.* Harris County	1130
Yeo *v.* Michigan	1132
Young & Co. *v.* Summer	1106
Zant; Baker *v.*	1115
Zant *v.* Spivey	1111
Zeffiro; First Pennsylvania Bank N. A. *v.*	1131

TABLE OF CASES CITED

Page

Abate v. Mundt, 403 U.S. 182 650

ABC Interstate Theatres, Inc. v. State, 325 So. 2d 123 756

Abney v. United States, 431 U.S. 651 266, 272, 273

Adams v. State, 341 So. 2d 765 786, 807

Adams v. Texas, 448 U.S. 38 811

Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 320, 333

Adams Express Co. v. Ohio State Auditor, 166 U.S. 185 320

Adickes v. S. H. Kress & Co., 398 U.S. 144 628

Agins v. City of Tiburon, 447 U.S. 255 447

Agosto v. INS, 436 U.S. 748 82

Alabama v. Pugh, 438 U.S. 781 684, 692

Albermarle Paper Co. v. Moody, 422 U.S. 405 226–228, 230, 233, 234, 240, 243, 244, 247, 249, 252

Alexander v. Gardner-Denver Co., 415 U.S. 36 228

Altus v. Carr, 255 F. Supp. 828 947, 949–951, 963

Ambach v. Norwick, 441 U.S. 68 12, 20–22, 31, 41, 42, 45

American Foreign S.S. Co. v. Matise, 423 U.S. 150 569

American Ins. Co. v. Canter, 1 Pet. 511 64, 65, 73, 74, 91, 106, 112, 114

American Party of Texas v. White, 415 U.S. 767 636

American Smelting and Refining Co. v. Idaho State Tax Comm'n, 99 Idaho 924 314, 315

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp, 456 U.S. 556 930

American Sugar Refining Co. v. Louisiana, 179 U.S. 89 650

Page

American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490 163

American Tobacco Co. v. Patterson, 456 U.S. 63 229, 240

Andrus v. Allard, 444 U.S. 51 433, 435, 436, 442

Aptheker v. Secretary of State, 378 U.S. 500 919

Arizona v. California, 373 U.S. 546 953

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 390, 402, 484, 485, 538, 544, 561, 611, 617, 618, 621

Armstrong v. State, 399 So. 2d 953 787, 806, 807, 809, 830

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 587

Aronson v. Quick Point Pencil Co., 440 U.S. 257 174

Arthur v. Nyquist, 573 F. 2d 134 482

ASARCO Inc. v. Idaho State Tax Comm'n, 445 U.S. 939 315

ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 357, 362, 369, 374

Ashwander v. TVA, 297 U.S. 288 769

Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 67, 70, 73, 77, 78

Baggett v. Bullitt, 377 U.S. 360 771

Bailey v. First Federal Sav. & Loan Assn., 467 F. Supp. 1139 151

Bakelite, Ex parte, 279 U.S. 438 67–69, 73, 109, 112, 118

Baker v. Carr, 369 U.S. 186 62, 634, 635, 640

Page
Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 951, 957
Ballew v. Georgia, 435 U.S. 223 778
Balzac v. Porto Rico, 258 U.S. 298 106
Barker v. Wingo, 407 U.S. 514 869
Barrows v. Jackson, 346 U.S. 249 768
Bartholomew v. Virginia Chiropractors Assn., 612 F. 2d 812 125
Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 320, 328, 333, 370
Bates v. Little Rock, 361 U.S. 516 930
Bates v. State Bar of Arizona, 433 U.S. 350 772
Beauharnais v. Illinois, 343 U.S. 250 763
Beck v. Alabama, 447 U.S. 625 811
Bedford v. United States, 192 U.S. 217 428
Bell v. Ohio, 438 U.S. 637 811
Bell v. Wolfish, 441 U.S. 520 1305
Benner v. Porter, 9 How. 235 106
Berenyi v. Information Director, 385 U.S. 630 623
Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 710
Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767 153
Bigelow v. Virginia, 421 U.S. 809 767, 771
Black v. Cutter Laboratories, 351 U.S. 292 723
Blackledge v. Perry, 417 U.S. 21 264, 267, 268, 273, 274
Blau v. Lehman, 368 U.S. 403 623
Block v. Hirsh, 256 U.S. 135 440, 451
Blum v. Bacon, 457 U.S. 132 154
Boag v. MacDougall, 454 U.S. 364 971, 973
Boardman v. Boardman, 135 Conn. 124 514
Board of Ed. v. Superior Court, 448 U.S. 1343 533
Board of Trustees v. Sweeney, 439 U.S. 24 224

Page
Bolden v. Mobile, 423 F. Supp. 384 618
Boutilier v. INS, 387 U.S. 118 864
Bowles v. Willingham, 321 U.S. 503 440
Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 522
Bradenburg v. Ohio, 395 U.S. 444 927, 928
Bradwell v. Illinois, 16 Wall. 130 725
Brady v. Maryland, 373 U.S. 83 868
Broadrick v. Oklahoma, 413 U.S. 601 766, 767, 769–772, 774, 776
Brown v. Board of Ed., 347 U.S. 483 40, 472, 632
Brown v. Califano, 201 U.S. App. D. C. 235 536, 542, 544
Brownell v. Tom We Shung, 352 U.S. 180 508
Bryant v. Houston, 273 F. 915 523
Buckley v. Valeo, 424 U.S. 1 58, 83, 88, 96
Bullington v. Missouri, 451 U.S. 430 811
Bullock v. Carter, 405 U.S. 134 636
Burch v. Louisiana, 441 U.S. 130 778
Burnet v. Aluminum Goods Mfg. Co., 287 U.S. 544 320
Burns v. Wilson, 346 U.S. 137 66
Burns Bros. v. Central R. Co. of New Jersey, 202 F. 2d 190 710
Burrus, In re, 136 U.S. 586 511, 519
Bustop, Inc. v. Board of Ed., 439 U.S. 1380; 439 U.S. 1384 531
Butler v. Frontier Telephone Co., 186 N. Y. 486 437
Butler Bros. v. McColgan, 315 U.S. 501 320, 328, 333, 334, 370, 372
Butner v. United States, 440 U.S. 48 174
Butz v. Economou, 438 U.S. 478 1102
Caban v. Mohammed, 441 U.S. 380 723, 741
Cabell v. Chavez-Salido, 454 U.S. 432 12, 20–23, 31, 41, 44, 45
Califano v. Goldfarb, 430 U.S. 199 733

Page

Califano v. Webster, 430 U.S. 313 728, 730
California v. Grace Brethren Church, 457 U.S. 393 590
California v. United States, 438 U.S. 645 952, 959, 960
California v. United States, 395 F. 2d 261 429
California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90 972
California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 657, 659, 666–668
Caminetti v. United States, 242 U.S. 470 571
Campbell v. United States, 365 U.S. 85 19
Cantwell v. Connecticut, 310 U.S. 296 773
Carafas v. LaVallee, 391 U.S. 234 509–511, 520, 521
Carey v. Brown, 447 U.S. 455 913
Carey v. Population Services International, 431 U.S. 678 781
Caribbean Federation Lines v. Dahl, 315 F. 2d 370 585
Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 767
Carrington v. Rash, 380 U.S. 89 636
Carroll v. Princess Anne, 393 U.S. 175 916, 920
Central Hardware Co. v. NLRB, 407 U.S. 539 434
Central Liquor Co. v. Oklahoma Alcoholic Beverage Control Bd., 640 P. 2d 1351 657
Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 836, 844
Chambers v. Maroney, 399 U.S. 42 261, 262
Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210 96
Chaplinsky v. New Hampshire, 315 U.S. 568 754, 763, 776, 927
Chauffeurs v. Newell, 356 U.S. 341 909
Chester, The, 25 F. 2d 908 585
Chevron Oil Co. v. Huson, 404 U.S. 97 87, 88

Page

Chicano Police Officer's Assn. v. Stover, 552 F. 2d 918 383
Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 88
Chrysler Corp. v. Brown, 441 U.S. 281 158
Chy Lung v. Freeman, 92 U.S. 275 11, 28
Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 954
Citizens Against Mandatory Bussing v. Brooks, 80 Wash. 2d 121 479
Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445 479, 480, 499
Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290 907, 908
City. See name of city.
Civil Rights Cases, 109 U.S. 3 390
Clinton v. Englebrecht, 13 Wall. 434 106
Cobbledick v. United States, 309 U.S. 323 269
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 265–267, 270, 272
Cohen v. California, 403 U.S. 15 911
Coker v. Georgia, 433 U.S. 584 788, 789, 793–798, 812–816, 818, 823, 824, 826
Colautti v. Franklin, 439 U.S. 379 18
Colegrove v. Green, 328 U.S. 549 633, 634
Coleman v. Miller, 307 U.S. 433 634
Collie v. Fergusson, 281 U.S. 52 572, 575, 577, 582, 583, 586
Colorado v. Kansas, 320 U.S. 383 960
Columbus Bd. of Ed. v. Penick, 443 U.S. 449 466, 472, 473, 495, 622
Commissioner v. Brown, 380 U.S. 563 571
Commissioner of Internal Revenue. See Commissioner.

Page
Commonwealth. See name of Commonwealth.
Community Communications Co. v. Boulder, 455 U.S. 40 126, 492
Compania Espanola de Navegacion Maritima v. The Navemar, 303 U.S. 68 710
Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87 332
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 350
Conference of Federal Sav. & Loan Assns. v. Stein, 604 F. 2d 1256 152, 160
Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77 315, 329
Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 781
Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 918
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 293, 570, 576
Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 658, 660, 661, 666, 668
Cooley v. Board of Wardens, 12 How. 299 954
Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90 972
Coopers & Lybrand v. Livesay, 437 U.S. 463 265, 267
County. See name of county.
Cousins v. City Council of Chicago, 466 F. 2d 830 646, 649, 651
Cox v. Lykes Brothers, 237 N. Y. 376 588
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 759, 907
Craig v. Boren, 429 U.S. 190 726, 740
Craig v. County of Los Angeles, 626 F. 2d 659 383
Crawford v. Los Angeles Bd. of Ed., 458 U.S. 527 476, 483, 485–487, 490, 494, 497
Crockett v. First Federal Sav. & Loan Assn., 289 N. C. 620 169

Page
Croker v. Boeing Co., 662 F. 2d 975 383, 409, 410, 413
Crooks v. Harrelson, 282 U.S. 55 575
Crowell v. Benson, 285 U.S. 22 68–70, 72–74, 77, 78, 80–86, 91, 101–102, 109, 110, 114, 115, 117, 769
Crumpton v. United States, 138 U.S. 361 867
Dandridge v. Williams, 397 U.S. 471 48
Dantus v. First Federal Sav. & Loan Assn., 502 F. Supp. 658 151
Davis v. Georgia, 429 U.S. 122 811
Davis v. Page, 640 F. 2d 599 507
Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526 483, 492, 538, 556
Dean Milk Co. v. City of Madison, 340 U.S. 349 957
De Canas v. Bica, 424 U.S. 351 13, 26, 27, 30, 31
De Jonge v. Oregon, 299 U.S. 353 908
Delaware, L. & W. R. Co. v. Morristown, 276 U.S. 182 426
Dennis v. Chang, 611 F. 2d 1302 488
Dennis v. Sparks, 449 U.S. 24 520
Department of State v. Washington Post Co., 456 U.S. 595 204, 213
Derenco, Inc. v. Benjamin Franklin Federal Sav. & Loan Assn., 281 Ore. 533 152
Des Vergnes v. Seekonk Water Dist., 601 F. 2d 9 383
Detroit Police Officers' Assn. v. Young, 608 F. 2d 671 383
DiBella v. United States, 369 U.S. 121 265
Dobbert v. Florida, 432 U.S. 282 811
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 660, 666, 668
Dombrowski v. Eastland, 387 U.S. 82 266
Dombrowski v. Pfister, 380 U.S. 479 769, 771
Donnell v. General Motors Corp., 576 F. 2d 1292 383

Page

Douglas v. Seacoast Products, Inc., 431 U.S. 265 951
Dowdell v. City of Apopka, 511 F. Supp. 1375 632
Duckworth v. Serrano, 454 U.S. 1 972
Dunn v. Blumstein, 405 U.S. 330 21, 636
Dynes v. Hoover, 20 How. 65 66
Earl of Westmeath v. Countess of Westmeath, 1 Jac. 245, 264 (reporter's footnote) 514, 521
East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 628
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 913, 914
Ebert v. Maryland State Bd. of Censors, 19 Md. App. 300 755
Eddings v. Oklahoma, 454 U.S. 104 811, 828
Edelman v. Jordan, 415 U.S. 651 683, 685, 689, 690, 697, 701
Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 440
Edwards v. South Carolina, 372 U.S. 229 773, 907, 909
Elfbrandt v. Russell, 384 U.S. 11 919
Elfrida, The, 172 U.S. 186 713
Elkins v. Moreno, 435 U.S. 647 6, 8, 13, 14, 45, 48
Employees v. Missouri Public Health Dept., 411 U.S. 279 683, 701
Epperson v. Arkansas, 393 U.S. 97 208
Erznoznik v. City of Jacksonville, 422 U.S. 205 765
Escobar v. SS Washington Trader, 503 F. 2d 271 586
Estelle v. Smith, 451 U.S. 454 811
Estes v. Metropolitan Branches of Dallas NAACP, 444 U.S. 437 473, 495, 501
Euclid v. Ambler Realty Co., 272 U.S. 365 447
Evans v. Bennett, 467 F. Supp. 1108 524
Examining Bd. v. Flores de Otero, 426 U.S. 572 22, 44

Page

Ex parte. See name of party.
Exxon Corp. v. Governor of Md., 437 U.S. 117 659, 665
Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 318, 320, 328–330, 333–336, 341–343, 362, 364, 369, 370, 372, 374
Fair Assessment in Real Estate Assn. v. McNary, 454 U.S. 100 512
Fargo v. Hart, 193 U.S. 490 320
Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 347
Fay v. Noia, 372 U.S. 391 523
FCC v. Pacifica Foundation, 438 U.S. 726 757, 763, 778, 781
FMC v. Seatrain Lines, Inc., 411 U.S. 726 126
Ferguson v. Skrupa, 372 U.S. 726 664
First Federal Sav. & Loan Assn. v. Greenwald, 591 F. 2d 417 152
First Federal Sav. & Loan Assn. v. Massachusetts Tax Comm'n, 437 U.S. 255 161
First Federal Sav. & Loan Assn. v. Peterson, 516 F. Supp. 732 151
Fisher v. United States, 328 U.S. 463 799
Fitzpatrick v. Bitzer, 427 U.S. 445 684, 690
Fletcher v. Weir, 455 U.S. 603 973
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 26, 27, 31, 153, 155
Foley v. Connelie, 435 U.S. 291 12, 21, 22, 31, 41, 45
Ford v. Ford, 371 U.S. 187 514
Ford Motor Co. v. Beauchamp, 308 U.S. 331 320
Ford Motor Co. v. Department of Treasury, 323 U.S. 459 683, 690
Forster v. Oro Navigation Co., 228 F. 2d 319 569, 585
Fortson v. Morris, 385 U.S. 231 89

Page
Francis v. Henderson, 425 U.S. 536 523
Franklin Nat. Bank v. New York, 347 U.S. 373 156, 163
Franks v. Bowman Transportation Co., 424 U.S. 747 226, 233, 239, 243, 244, 247, 251, 252
Frederick County Fruit Growers Assn., Inc. v. Marshall, No. 78-0086(H) (WD Va.) 598
Free v. Bland, 369 U.S. 663 153, 154
Freeman v. State of Georgia, 599 F. 2d 65 866
Frontiero v. Richardson, 411 U.S. 677 725, 726, 728, 740
F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 20, 39
Fullilove v. Klutznick, 448 U.S. 448 61
Funaro v. Watchorn, 164 F. 152 523
Fung Ho v. White, 259 U.S. 276 82
Furman v. Georgia, 408 U.S. 238 789, 813
Furnco Construction Corp. v. Waters, 438 U.S. 567 224, 396
F. W. Woolworth Co. v. Taxation & Revenue Dept., 458 U.S. 354 328
Galvan v. Press, 347 U.S. 522 875
Gardner v. Florida, 430 U.S. 349 811
Garrison v. Louisiana, 379 U.S. 64 913
Geer v. Connecticut, 161 U.S. 519 948, 950, 951
General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375 925
General Motors Corp. v. Washington, 377 U.S. 436 320
Georgia v. Pennsylvania R. Co., 324 U.S. 439 601, 605, 606, 608, 610
Georgia v. Rachel, 384 U.S. 780 384
Georgia v. Tennessee Copper Co., 206 U.S. 230 603, 604, 962
Georgia v. United States, 411 U.S. 526 89
Giboney v. Empire Storage & Ice Co., 336 U.S. 490 762, 912

Page
Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 930
Giglio v. United States, 405 U.S. 150 874
Gilmore v. Utah, 429 U.S. 1012 524
Ginsberg v. New York, 390 U.S. 629 755, 757, 776
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 472, 612
Glendale Federal Sav. & Loan Assn. v. Fox, 459 F. Supp. 903 151, 161
Glidden Co. v. Zdanok, 370 U.S. 530 63, 69, 93, 112, 114
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 757, 776
Godfrey v. Georgia, 446 U.S. 420 800, 811
Goesaert v. Cleary, 335 U.S. 464 725
Goldberg v. United States, 425 U.S. 94 18
Goldblatt v. Town of Hempstead, 369 U.S. 590 442
Gomillion v. Lightfoot, 364 U.S. 339 652
Gooding v. Wilson, 405 U.S. 518 767, 769, 771
Gordon v. Lance, 403 U.S. 1 498
Gordon v. United States, 117 U.S. 697 86
Graham v. Richardson, 403 U.S. 365 10, 12, 20, 29, 30, 32, 39, 40, 44, 47
Graver Tank & Mfg. Co. v. Linde Co., 336 U.S. 271 623
Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 958
Green v. Georgia, 442 U.S. 95 811, 828
Gregg v. Georgia, 428 U.S. 153 794, 797–799, 801, 810, 811, 814, 1115, 1122
Gremillion v. NAACP, 366 U.S. 293 930
Griffin v. Breckenridge, 403 U.S. 88 390
Griffiths, In re, 413 U.S. 717 22, 44

Page

Griggs v. Allegheny County, 369 U.S. 84 431

Griggs v. Duke Power Co., 401 U.S. 424 228, 383, 388

Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 125–136, 138

Guaranty Trust Co. v. United States, 304 U.S. 126 37

Guardians Assn. v. Civil Service Comm'n of New York City, 633 F. 2d 232 383

Gulf Federal Sav. & Loan Assn. v. Federal Home Loan Bank Bd., 651 F. 2d 259 152, 170, 174

Gunther v. White, 489 S. W. 2d 529 169

Haggar Co. v. Helvering, 308 U.S. 389 575

Hamilton v. Regents of Univ. of California, 293 U.S. 245 37

Hamling v. United States, 418 U.S. 87 755, 765

Hampton v. Mow Sun Wong, 426 U.S. 88 21, 23, 24, 40, 44

Hans v. Louisiana, 134 U.S. 1 683, 700

Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123 320, 334, 371

Harisiades v. Shaughnessy, 342 U.S. 580 10

Harlow v. Fitzgerald, 457 U.S. 800 746

Harper v. Virginia Bd. of Elections, 383 U.S. 663 39, 635

Harris v. Nelson, 394 U.S. 286 526

Harris v. Rivera, 454 U.S. 339 972

Harrison v. PPG Industries, Inc., 446 U.S. 578 295, 589

Hashimoto v. MacArthur, 87 U.S. App. D. C. 268 523

Hauenstein v. Lynham, 100 U.S. 483 157

Havens Realty Corp. v. Coleman, 455 U.S. 363 472, 611

Hawaii v. Standard Oil Co., 405 U.S. 251 600

Haynes v. United States, 390 U.S. 85 769

Page

Healy v. James, 408 U.S. 169 919, 920, 925

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 440

Heaton v. Bristol, 317 S. W. 2d 86 742, 743

Helstoski v. Meanor, 442 U.S. 500 266

Helvering v. Hammel, 311 U.S. 504 571

Henry v. First National Bank of Clarksdale, 595 F. 2d 291 915

Henry v. First National Bank of Clarksdale, 424 F. Supp. 633 894

Henry v. First National Bank of Clarksdale, 50 F. R. D. 251 890

Hensley v. Municipal Court, 411 U.S. 345 509–511, 516, 520–522

Hicklin v. Orbeck, 437 U.S. 518 956

Hills v. Gautreaux, 425 U.S. 284 398, 399

Hines v. Davidowitz, 312 U.S. 52 10, 11, 29, 30, 37, 153, 156, 845

Ho v. White, 259 U.S. 276 82

Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264 962

Holiday Acres No. 3 v. Midwest Federal Sav. & Loan Assn., 308 N. W. 2d 471 151, 170

Holley v. Lavine, 605 F. 2d 638 488

Holt Civic Club v. Tuscaloosa, 439 U.S. 60 476, 492

Holy Trinity Church v. United States, 143 U.S. 457 578

Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 440

Houston & Texas R. Co. v. United States, 234 U.S. 342 961

H. P. Hood & Sons v. Du Mond, 336 U.S. 525 956

Huddleston v. United States, 415 U.S. 814 304

Hudgens v. NLRB, 424 U.S. 507 434

Hudson County Water Co. v. McCarter, 209 U.S. 349 945–948, 950

Page

Huffman v. Pursue, Ltd., 420 U.S. 592 1113, 1115

Hughes v. Oklahoma, 441 U.S. 322 951, 957, 958, 963

Hughes v. Superior Court, 339 U.S. 460 489, 915

Humphrey v. Moore, 375 U.S. 335 229, 240

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 612

Hunter v. Erickson, 393 U.S. 385 465–477, 483–487, 490, 493, 495–498, 537, 538, 540, 541, 546, 547, 551–553, 555–558, 560, 561

Hurd v. Hodge, 334 U.S. 24 384, 389

Huron Portland Cement Co. v. Detroit, 362 U.S. 440 664

Hutto v. Davis, 454 U.S. 370 815, 972

Hutto v. Finney, 437 US. 678 684, 690

Incarcerated Men of Allen County Jail v. Fair, 507 F. 2d 281 488

In re. See name of party.

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 88, 328

International Shoe Co. v. Washington, 326 U.S. 310 960

Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 754, 755

ICC v. Brimson, 154 U.S. 447 86

Isaacs v. United States, 159 U.S. 487 867

Isbrandtsen Co. v. Johnson, 343 U.S. 779 584

Jackson v. Pasadena City School Dist., 59 Cal. 2d 876 548–550, 555

Jacobellis v. Ohio, 378 U.S. 184 755, 776

Jago v. Van Curen, 454 U.S. 14 972

James v. Valtierra, 402 U.S. 137 484, 485, 496, 538, 541

Jarecki v. G. D. Searle & Co., 367 U.S. 303 163

Jencks v. United States, 353 U.S. 657 881

Page

Jenkins v. Georgia, 418 U.S. 153 755

Johnson v. Alexander, 572 F. 2d 1219 383

Johnson v. Cook, 304 U.S. 387 600

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 387, 408

Jones v. Alfred H. Mayer Co., 392 U.S. 409 384, 387, 388, 390, 406, 408

Jones v. Cunningham, 371 U.S. 236 509–511, 514, 516, 517, 519–521

Jones v. Rath Packing Co., 430 U.S. 519 153

Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 659, 660, 662, 665

Juidice v. Vail, 430 U.S. 327 1114, 1115

Jurek v. Texas, 428 U.S. 262 811

Kaiser Aetna v. United States, 444 U.S. 164 433, 435, 442, 444, 451

Kansas v. Colorado, 185 U.S. 125 603, 605, 963

Kansas v. Colorado, 206 U.S. 46 603

Karcher v. Daggett, 455 U.S. 1303 1302

Kaski v. First Federal Sav. & Loan Assn., 72 Wis. 2d 132 152, 170

Katchen v. Landy, 382 U.S. 323 79, 97, 99

Katzenbach v. Morgan, 384 U.S. 641 732

Kendall v. United States, 12 Pet. 524 65, 75

Kennerly v. District Court of Montana, 400 U.S. 423 843

Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 492

Keyishian v. Board of Regents, 385 U.S. 589 916

King v. Delaval, 3 Burr. 1434 517, 524

King v. McLean Asylum of Massachusetts General Hospital, 64 F. 331 524

Kinsey v. First Regional Securities, Inc., 181 U.S. App. D. C. 207 383

Page
Kirchberg v. Feenstra, 450 U.S. 455 724, 726, 740
Kirschbaum Co. v. Walling, 316 U.S. 517 961
Kleindienst v. Mandel, 408 U.S. 753 864
Kontos v. SS Sophie C., 236 F. Supp. 664 585
Krulewitch v. United States, 336 U.S. 440 888, 933
Kupiec v. Republic Federal Sav. & Loan Assn., 512 F. 2d 147 152
Kusper v. Pontikes, 414 U.S. 51 636
Lake Galewood, The, 21 F. 2d 987 585
Lakin v. United States, 363 A. 2d 990 755
Lane v. Wilson, 307 U.S. 268 413
Larkins v. Hudson Waterways Corp., 640 F. 2d 997 569
Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 688, 689, 693, 695, 696, 711, 714–716
Larson v. Valente, 456 U.S. 228 944
La Sala v. American Sav. & Loan Assn., 5 Cal. 3d 864 171
Lee v. Nyquist, 318 F. Supp. 710 465, 466, 469, 470, 473, 477, 480, 482, 483, 497, 551, 553, 556, 559
Leeke v. Timmerman, 454 U.S. 83 972
Lehman, In re, Nos. 2986, 2987, 2988 (Ct. Common Pleas, Pa.) 504
Lehman v. Lycoming County Children's Services, 439 U.S. 880 505
Leisy v. Hardin, 135 U.S. 100 350
Levy Leasing Co. v. Siegel, 258 U.S. 242 440
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 350, 959
L'Invincible, 1 Wheat. 238 710
Lisenba v. California, 314 U.S. 219 872, 876
Lockett v. Ohio, 438 U.S. 586 798, 811, 815, 816, 819, 824, 827, 828, 831

Page
Logue v. United States, 412 U.S. 521 393
Longshoremen v. Allied International, Inc., 456 U.S. 212 912
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 239
Los Angeles NAACP v. Los Angeles Unified School Dist., 513 F. Supp. 717 534
Los Angeles Unified School Dist. v. District Court, 650 F. 2d 1004 535
Louisiana v. Jumel, 107 U.S. 711 711
Louisiana v. Texas, 176 U.S. 1 602, 603
Louisiana v. United States, 380 U.S. 145 233, 243
Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 930
Lovett v. West Va. Central Gas Co., 65 W. Va. 739 430
Lubin v. Panish, 415 U.S. 709 636
Lucas v. Colorado General Assembly, 377 U.S. 713 558
Lugar v. Edmonson Oil Co., 457 U.S. 922 520
Lukens v. Spokane School Dist. No. 81, 147 Wash. 467 479
Lummus Co. v. NLRB, 119 U.S. App. D. C. 229 393
Lund v. Affleck, 587 F. 2d 75 488
Lung v. Freeman, 92 U.S. 275 11, 28
Luther v. Borden, 7 How. 1 492, 634
Lyons v. Blenkin, 1 Jac. 245 514, 521
Lyons Sav. & Loan Assn. v. Federal Home Loan Bank Bd., 377 F. Supp. 11 152
MacDonald v. Plymouth Trust Co., 286 U.S. 263 80
Maher v. Gagne, 448 U.S. 122 684
Malone v. Bowdoin, 369 U.S. 643 715
Malouff v. Midland Federal Sav. & Loan Assn., 181 Colo. 294 169
Mandel v. Bradley, 432 U.S. 173 636
Marbury v. Madison, 1 Cranch 137 733
Marks v. United States, 430 U.S. 188 755, 778

Page

Marshall v. United States, 360 U.S. 310 878
Martin v. Peoples Mutual Federal Sav. & Loan Assn., 319 N. W. 2d 220 169
Maryland v. Louisiana, 451 U.S. 725 608, 610
Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 89
Massachusetts v. Mellon, 262 U.S. 447 610
Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 47
Mathews v. Diaz, 426 U.S. 67 10, 33, 864, 875
Mathews v. Lucas, 427 U.S. 495 648
Mathews v. Weber, 423 U.S. 261 81
Matters v. Ryan, 249 U.S. 375 511, 519
Mavromatis v. United Greek Shipowners Corp., 179 F. 2d 310 569, 584
McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 353
McCarthy v. United States, 394 U.S. 459 878
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 837, 838, 846
McConville v. Florida Towing Corp., 321 F. 2d 162 585
McCrary v. State, 533 P. 2d 629 756
McCray v. Illinois, 386 U.S. 300 870, 871, 883
McCrea v. United States, 294 U.S. 23 570, 583
McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 384, 389, 408
McDonnell Douglas Corp. v. Green, 411 U.S. 792 224, 228
McGowan v. Maryland, 366 U.S. 420 39, 49, 767
McInnis v. Shapiro, 293 F. Supp. 327 200
McKinney v. Estelle, 657 F. 2d 740 973
McKinny v. Oxnard Union High School Dist. Bd. of Trustees, 31 Cal. 3d 79 536, 557

Page

McLaughlin v. Florida, 379 U.S. 184 537, 559
M'Clellan, Ex parte, 1 Dowl. 81 514, 522
McNeese v. Board of Ed., 373 U.S. 668 1115
Memoirs v. Massachusetts, 383 U.S. 413 756
Memphis v. Greene, 451 U.S. 100 387, 388, 390
Memphis Laundry-Cleaners v. Lindsey, 192 Miss. 224 891
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 960
Merriweather v. Hercules, Inc., 631 F. 2d 1161 231, 232
Mescalero Apache Tribe v. Jones, 411 U.S. 145 854
Mescall v. Burrus, 603 F. 2d 1266 383
Messicano, The, 32 T. L. R. 519 709
Metromedia, Inc. v. San Diego, 453 U.S. 490 497, 781, 949
Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783 951
Meyers v. Beverly Hills Federal Sav. & Loan Assn., 499 F. 2d 1145 152
Michelin Tire Corp. v. Wages, 423 U.S. 276 855
Michigan v. Thomas, 458 U.S. 259 973
Middlesex County Ethics Committee v. Garden State Bar Assn., 457 U.S. 423 1114
Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287 923, 924
Miller v. California, 413 U.S. 15 753, 755, 756, 760, 761, 764, 765, 777, 778
Milliken v. Bradley, 418 U.S. 717 398, 472, 480, 481, 628
Milliken v. Bradley, 433 U.S. 267 398, 628, 690
Mills v. Board of Ed. of District of Columbia, 348 F. Supp. 866 180, 192–194, 197, 199, 214
Mine Workers v. Gibbs, 383 U.S. 715 917, 918, 923

Page
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 665
Mississippi Chem. Corp. v. Chemical Constr. Corp., 444 F. Supp. 925 890
Missouri v. Illinois, 180 U.S. 208 603
Missouri v. National Organization for Women, Inc., 620 F. 2d 1301 914
Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 252
Mobile v. Bolden, 446 U.S. 55 467, 486, 616–621, 624, 628–631, 638, 640, 641, 652
Mobil Oil Corp. v. Commissioner of Taxes of Vt., 445 U.S. 425 312, 315–320, 327–330, 332–336, 342, 343, 345, 346, 350, 360, 362–364, 369–372, 374
Moe v. Salish & Kootenai Tribes, 425 U.S. 463 844, 854
Monroe v. Pape, 365 U.S. 167 5
Moore v. Illinois, 408 U.S. 786 868
Moore v. Sims, 442 U.S. 415 1114, 1115
Moorman Mfg. Co. v. Bair, 437 U.S. 267 316, 328, 332, 363
Moreno v. University of Maryland, 420 F. Supp. 541 5
Mormon Church v. United States, 136 U.S. 1 600
Morrison-Knudsen Co. v. NLRB, 275 F. 2d 914 416
MPI, Inc. v. McCullough, 463 F. Supp. 887 890
Mullaney v. Wilbur, 421 U.S. 684 800
Munn v. Illinois, 94 U.S. 113 454
Murphy v. Hunt, 455 U.S. 478 187
Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272 63, 67–69, 73, 91, 106–109, 114
Mystic S.S. Co. v. Stromland, 20 F. 2d 342 584
Nash ex rel. Hashimoto v. MacArthur, 87 U.S. App. D. C. 268 523
NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 914, 930

Page
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 908, 930
NAACP v. Button, 371 U.S. 415 560, 612, 771, 916, 930
NAACP v. Overstreet, 384 U.S. 118 931
National Bellas Hess, Inc. v. Illinois Dept. of Revenue, 386 U.S. 753 316
National Ins. Co. v. Tidewater Co., 337 U.S. 582 61, 72, 111, 112, 116
NLRB v. Amax Coal Co., 453 U.S. 322 395
NLRB v. Arduini Mfg. Corp., 394 F. 2d 420 232
NLRB v. Babcock & Wilcox Co., 351 U.S. 105 434
NLRB v. Bell Aerospace Co., 416 U.S. 267 167
NLRB v. Huntington Hospital, Inc., 550 F. 2d 921 233
NLRB v. Insurance Agents, 361 U.S. 477 394
NLRB v. Madison Courier, Inc., 153 U.S. App. D. C. 232 231, 232
NLRB v. Midwest Hanger Co., 550 F. 2d 1101 233
NLRB v. Retail Store Employees, 447 U.S. 607 912
NLRB v. St. Marys Sewer Pipe Co., 146 F. 2d 995 232
NLRB v. Southern Silk Mills, Inc., 242 F. 2d 697 232
National Motor Freight Assn. v. United States, 372 U.S. 246 612
National Society of Professional Engineers v. United States, 435 U.S. 679 912
Nevett v. Sides, 571 F. 2d 209 621, 624
New England Power Co. v. New Hampshire, 455 U.S. 331 959, 960
New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96 659, 662
New York, In re, 256 U.S. 490 683, 698, 699, 703, 706–710
New York, In re, 256 U.S. 503 698, 699, 703, 706–710

Page

New York v. New Jersey, 256 U.S. 296 603, 604
New York v. United States, 326 U.S. 572 855
New York Foundling Hospital v. Gatti, 203 U.S. 429 524
New York Times Co. v. Sullivan, 376 U.S. 254 763, 774, 913, 916, 928
Ng Fung Ho v. White, 259 U.S. 276 82
Nichols v. Ann Arbor Federal Sav. & Loan Assn., 73 Mich. App. 163 169
Nixon v. Herndon, 273 U.S. 536 467
Norfolk & Western R. Co. v. Missouri Tax Comm'n, 390 U.S. 317 316, 372
Norfolk & Western R. Co. v. North Carolina ex rel. Maxwell, 297 U.S. 682 320, 334
North Carolina v. Pearce, 395 U.S. 711 267, 274
North Carolina State Bd. of Ed. v. Swann, 402 U.S. 43 472, 556
North Dakota v. Minnesota, 263 U.S. 365 603, 604
Northern Pacific R. Co. v. United States, 356 U.S. 1 660
Northern Transportation Co. v. Chicago, 99 U.S. 635 427
Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 352
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 320, 333
Noto v. United States, 367 U.S. 290 919, 920, 925, 928
Nyquist v. Mauclet, 432 U.S. 1 22, 44, 47
Occidental Sav. & Loan Assn. v. Venco Partnership, 206 Neb. 469 169
Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 68
O'Donoghue v. United States, 289 U.S. 516 60, 110, 111
Oklahoma v. Atchison, T. & S. F. R. Co., 220 U.S. 277 600
Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 600

Page

Olson v. City of Wahoo, 124 Neb. 802 950, 964
O'Neil v. Vermont, 144 U.S. 323 788
Organization for a Better Austin v. Keefe, 402 U.S. 415 910
Orr v. Orr, 440 U.S. 268 724, 726, 730, 741
Osborn v. Bank of United States, 9 Wheat. 738 72, 86
Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 372
Oyama v. California, 332 U.S. 633 40
Pacific Mail S.S. Co. v. Schmidt, 241 U.S. 245 574–576, 580, 582, 584
Palmer v. Thompson, 403 U.S. 217 539
Palmore v. United States, 411 U.S. 389 61–63, 65, 72, 75, 76, 91, 114, 115, 117
Panko v. Pan American Federal Sav. & Loan Assn., 119 Cal. App. 3d 916 149
Paris Adult Theatre I v. Slaton, 413 U.S. 49 777
Parker v. Brown, 317 U.S. 341 663
Parker v. Levy, 417 U.S. 733 770, 773
Parlement Belge, The, 5 P. D. 197 709
Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424 492
Patton v. First Federal Sav. & Loan Assn., 118 Ariz. 473 169
Paul v. Virginia, 8 Wall. 168 135
Penn Central Transportation Co. v. New York City, 438 U.S. 104 425, 426, 432–434, 440, 442, 447
Pennhurst State School v. Halderman, 451 U.S. 1 204, 210
Pennsylvania v. New Jersey, 426 U.S. 660 600
Pennsylvania v. West Virginia, 262 U.S. 553 605, 608, 947, 948, 963
Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518 352

Page
Pennsylvania Assn. for Retarded Children v. Commonwealth, 334 F. Supp. 1257 180, 192–194, 197, 199, 214
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 442
People v. Coast Federal Sav. & Loan Assn., 98 F. Supp. 311 145, 152
People v. Illardo, 48 N. Y. 2d 408 753
People v. Neumayer, 405 Mich. 341 755
Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 21, 23, 390, 471, 484, 485, 492, 537, 544, 553, 637, 724
Phelps Dodge Corp. v. NLRB, 313 U.S. 177 163, 231
Philadelphia v. New Jersey, 437 U.S. 617 953, 957
Pike v. Bruce Church, Inc., 397 U.S. 137 954
Pinkus v. United States, 436 U.S. 293 755, 778
Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 762
Plessy v. Ferguson, 163 U.S. 537 741
Plyler v. Doe, 457 U.S. 202 546
Pope v. State, 84 Fla. 428 808
Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 430
Price v. Florida Federal Sav. & Loan Assn., 524 F. Supp. 175 151
Prince v. Massachusetts, 321 U.S. 158 757
Prindes v. S.S. African Pilgrim, 266 F. 2d 125 585
Proffitt v. Florida, 428 U.S. 242 811, 827, 829
Prudential Ins. Co. v. Benjamin, 328 U.S. 408 960
PruneYard Shopping Center v. Robins, 447 U.S. 74 434, 435, 444, 445, 451, 455
Pullman-Standard v. Swint, 456 U.S. 273 622, 623
Pumpelly v. Green Bay Co., 13 Wall. 166 427, 428, 433

Page
Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 440, 449
Quern v. Jordan, 440 U.S. 332 685, 690
Rahrer, In re, 140 U.S. 545 350, 952, 960
Railroad Comm'n v. Pullman Co., 312 U.S. 496 1115
Ray v. Atlantic Richfield Co., 435 U.S. 151 26, 27, 36
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 167
Redrup v. New York, 386 U.S. 767 754, 755
Reed v. Reed, 404 U.S. 71 723, 726, 728, 740
Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123 320, 334, 371
Reeves, Inc. v. Stake, 447 U.S. 429 957
Reid v. Covert, 354 U.S. 1 66, 67
Reiter v. Sonotone Corp., 442 U.S. 330 576
Reitman v. Mulkey, 387 U.S. 369 538, 539, 543, 557, 558, 560, 562
Rettig v. Arlington Heights Federal Sav. & Loan Assn., 405 F. Supp. 819 152
Reynolds v. Sims, 377 U.S. 533 638, 646
Reynolds v. United States, 98 U.S. 145 106
Rice v. Alcoholic Beverage Control Appeals Bd., 21 Cal. 3d 431 657
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 153
Ridgway v. Ridgway, 454 U.S. 46 153, 154
Rivers, In re, 19 B. R. 438 56, 57
Rizzo v. Goode, 423 U.S. 362 396, 920
Roberts (Harry) v. Louisiana, 431 U.S. 633 811
Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 811, 814
Robinson v. California, 370 U.S. 660 800
Ross, In re, 140 U.S. 453 65, 114
Rostker v. Goldberg, 448 U.S. 1306 1306

Page

Roth v. United States, 354 U.S. 476 754

Roviaro v. United States, 353 U.S. 53 870, 871, 883, 884

Rowell v. Oesterle, 626 F. 2d 437 507

Rowley v. Board of Ed. of Hendrick Hudson Central School Dist., 632 F. 2d 945 972

Royster Guano Co. v. Virginia, 253 U.S. 412 20, 39

Rubin v. United States, 449 U.S. 424 302

Rummel v. Estelle, 445 U.S. 263 815

Runyon v. McCrary, 427 U.S. 160 384, 386–388, 405, 406, 408

Sailors v. Board of Ed., 387 U.S. 105 493

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 82

St. Louis v. Western Union Telegraph Co., 148 U.S. 92 428, 429, 446

Sale v. Sale, 1 Beav. 586 524

Samad v. The Etivebank, 134 F. Supp. 530 585

Samuels v. Mackell, 401 U.S. 66 916

San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 200, 208, 214, 215, 486

San Diego Building Trades Council v. Garmon, 359 U.S. 236 918

San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937 550, 551, 556

Sanguinetti v. United States, 264 U.S. 146 428

Santa Barbara School Dist. v. Superior Court, 13 Cal. 3d 315 551

Santissima Trinidad, The, 7 Wheat. 283 710

Santosky v. Kramer, 455 U.S. 745 511

Saunders v. Hercules, Inc., 510 F. Supp. 1137 227

Scales v. United States, 367 U.S. 203 919, 920, 925

Schad v. Borough of Mount Ephraim, 452 U.S. 61 778, 781

Page

Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 768

Schenck v. United States, 249 U.S. 47 927

Scheuer v. Rhodes, 416 U.S. 232 690

Schlesinger v. Ballard, 419 U.S. 498 728, 740

Schneider v. Smith, 390 U.S. 17 769

School Dist. of Lansing v. State Bd. of Ed., 367 Mich. 591 481

Schooner Exchange, The v. McFaddon, 7 Cranch 116 710

Schumacher v. Beeler, 293 U.S. 367 72

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 666–668

Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 659, 660, 662, 665

Seattle Newspaper-Web Pressman's Union Local No. 26 v. Seattle, 24 Wash. App. 462 479

Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476 477, 499

SEC v. National Securities, Inc., 393 U.S. 453 128, 131, 136

Segarra, In re, 14 B. R. 870 57

Shriner v. State, 386 So. 2d 525 830

Sierra Club v. Morton, 405 U.S. 727 612

Siren, The, 7 Wall. 152 710

62 Cases of Jam v. United States, 340 U.S. 593 190

Smith v. California, 361 U.S. 147 765

Smith v. Daily Mail Publishing Co., 443 U.S. 97 759

Smith v. United States, 431 U.S. 291 778, 781

Songer v. State, 365 So. 2d 696 830

South Carolina v. Katzenbach, 383 U.S. 301 632

South Dakota v. Opperman, 428 U.S. 364 260

Southern Cross S.S. Co. v. Firipis, 285 F. 2d 651 569, 575, 585, 586

Page

Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 943, 954
Southwestern Bell Telephone Co. v. Webb, 393 S. W. 2d 117 430
Spero v. Steamship The Argodon, 150 F. Supp. 1 585
Stack v. Boyle, 342 U.S. 1 265
Stanley v. Georgia, 394 U.S. 557 755
Stanton v. Stanton, 421 U.S. 7 724, 726, 730, 740
State. See also name of State.
State v. Burgun, 56 Ohio St. 2d 354 756
State v. Princess Cinema of Milwaukee, Inc., 96 Wis. 2d 646 756
State v. Welke, 298 Minn. 402 755
State ex rel. Citizens Against Mandatory Bussing v. Brooks, 80 Wash. 2d 121 479
State ex rel. Lukens v. Spokane School Dist. No. 81, 147 Wash. 467 479
Stephens v. Cherokee Nation, 174 U.S. 445 114
Stone v. Powell, 428 U.S. 465 523
Storer v. Brown, 415 U.S. 724 635
Strait v. Laird, 406 U.S. 341 508, 522
Strauder v. West Virginia, 100 U.S. 303 40
Sugarman v. Dougall, 413 U.S. 634 12, 21, 22, 24, 42, 44
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 408
Sumner v. Mata, 455 U.S. 591 972
Swain v. Isthmian Lines, Inc., 360 F. 2d 81 569, 575, 586
Swall, Ex parte, 36 Nev. 171 514
Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 398, 472, 484, 491, 492, 537, 558, 559
Swanson v. Torry, 25 F. 2d 835 585
Sylvander v. New England Home for Little Wanderers, 584 F. 2d 1103 506, 507, 513–515, 518, 520
Takahashi v. Fish & Game Comm'n, 334 U.S. 410 10–12, 28–30
Taylor v. Philips Industries, Inc., 593 F. 2d 783 232

Page

Teamsters v. United States, 431 U.S. 324 226, 233, 239, 383, 405
Tejeda-Mata v. INS, 626 F. 2d 721 973
TVA v. Hill, 437 U.S. 153 576, 843
Terminiello v. City of Chicago, 337 U.S. 1 768
Testa v. Katt, 330 U.S. 386 157
Texas v. White, 423 U.S. 67 261, 262
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 224, 225
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 174
Textile Workers v. Lincoln Mills, 353 U.S. 448 72
Thomas v. Collins, 323 U.S. 516 910, 911
Thomas v. SS Santa Mercedes, 572 F. 2d 1331 569
Thornhill v. Alabama, 310 U.S. 88 769, 771, 909
Thornton v. East Texas Motor Freight, 497 F. 2d 416 231
Tierce v. APS Co., 382 So. 2d 485 169
Tigner v. Texas, 310 U.S. 141 39, 542
Tillman v. Wheaton-Haven Recreation Assn., 410 U.S. 431 386, 408
Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 1302
Tindal v. Wesley, 167 U.S. 204 685–688, 697, 706, 708, 715
Toll v. Moreno, 441 U.S. 458 8, 18, 48
Toll v. Moreno, 284 Md. 425 7
Toomer v. Witsell, 334 U.S. 385 951
Toth v. Quarles, 350 U.S. 11 59, 67, 70, 73
Trainor v. Hernandez, 431 U.S. 434 1114, 1115
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 229
Treasure Salvors, Inc. v. Abandoned Sailing Vessel, 408 F. Supp. 907 676, 677, 704

Page
Trop v. Dulles, 356 U.S. 86 813
Truax v. Raich, 239 U.S. 33 10, 11, 28, 30, 32
Tucker v. Lassen Sav. & Loan Assn., 12 Cal. 3d 629 171
Udall v. Tallman, 380 U.S. 1 158
Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 320, 328, 333, 370
United Jewish Organizations v. Carey, 430 U.S. 144 624, 649
United States v. Agurs, 427 U.S. 97 866, 868, 874
United States v. Alessi, 536 F. 2d 978 274
United States v. American Trucking Assns., Inc., 310 U.S. 534 571, 575
United States v. Andolschek, 142 F. 2d 503 881
United States v. Armijo-Martinez, 669 F. 2d 1131 860
United States v. Augenblick, 393 U.S. 348 872
United States v. Avila-Dominguez, 610 F. 2d 1266 860, 863, 874, 878
United States v. Bass, 404 U.S. 336 290
United States v. Beekman, 155 F. 2d 580 882
United States v. Brizendine, 212 U.S. App. D. C. 169 264, 274
United States v. Brown, 333 U.S. 18 303
United States v. Burr, 25 F. Cas. 187 871, 882
United States v. Burt, 619 F. 2d 831 264
United States v. Bush, 599 F. 2d 72 305
United States v. Calandrella, 605 F. 2d 236 300
United States v. Caltex, Inc., 344 U.S. 149 442
United States v. Calzada, 579 F. 2d 1358 860, 863
United States v. Carolene Products Co., 304 U.S. 144 23, 486, 547
United States v. Causby, 328 U.S. 256 430, 431, 437, 438, 451, 454, 456

Page
United States v. Central Eureka Mining Co., 357 U.S. 155 431, 432, 450
United States v. Coe, 155 U.S. 73 106, 114
United States v. Colgate & Co., 250 U.S. 300 668
United States v. Constant, 501 F. 2d 1284 305
United States v. County of Fresno, 429 U.S. 452 855
United States v. Cress, 243 U.S. 316 428
United States v. Culbert, 435 U.S. 371 294, 302
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 10
United States v. Darby, 312 U.S. 100 760, 961
United States v. Edwards, 455 F. Supp. 1354 288
United States v. Enmons, 410 U.S. 396 286, 290
United States v. Florida, 420 U.S. 531 676, 693, 705, 711–713
United States v. Florida, 425 U.S. 791 676, 680
United States v. General Motors Corp., 323 U.S. 373 435
United States v. Giordano, 489 F. 2d 327 305
United States v. Gonzalez-Hernandez, 534 F. 2d 1353 884
United States v. Goodwin, 457 U.S. 368 274
United States v. Green, 26 F. Cas. 30 524
United States v. Greene, 578 F. 2d 648 296
United States v. Gregory, 656 F. 2d 1132 264, 274
United States v. Griffin, 617 F. 2d 1342 264
United States v. Hollywood Motor Car Co., 458 U.S. 263 973
United States v. Kagama, 118 U.S. 375 493
United States v. Kansas City Life Ins. Co., 339 U.S. 799 428, 446
United States v. Krown, 675 F. 2d 46 284, 287

Page

United States v. Lee, 106 U.S. 196 688, 706, 715
United States v. Lovasco, 431 U.S. 783 869, 872
United States v. Lynah, 188 U.S. 445 428
United States v. MacDonald, 435 U.S. 850 266, 267, 269, 270, 272, 273, 869
United States v. Marion, 404 U.S. 307 868, 869, 872
United States v. McKeeson & Robbins, Inc., 351 U.S. 305 126
United States v. Mendez-Rodriguez, 450 F. 2d 1 862, 863, 877, 882
United States v. Mine Workers, 330 U.S. 258 681
United States v. Moore, 423 U.S. 122 302, 303
United States v. Naftalin, 441 U.S. 768 294, 302
United States v. New Mexico, 455 U.S. 720 855–857
United States v. New York Telephone Co., 434 U.S. 159 401
United States v. Nixon, 418 U.S. 683 882
United States v. O'Brien, 391 U.S. 367 912
United States v. Payne, 602 F. 2d 1215 284, 285, 299, 300
United States v. Peters, 3 Dall. 121 710
United States v. Pewee Coal Co., 341 U.S. 114 431
United States v. Pink, 315 U.S. 203 37
United States v. Pinto, 646 F. 2d 833 294, 305
United States v. Price, 383 U.S.787 386
United States v. Raddatz, 447 U.S. 667 77, 79–84, 86, 101
United States v. Raines, 362 U.S. 17 90, 767–769
United States v. Reynolds, 345 U.S. 1 881
United States v. Robel, 389 U.S. 258 919
United States v. Rose, 669 F. 2d 23 860

Page

United States v. Ross, 456 U.S. 798 261
United States v. Rumely, 345 U.S. 41 769
United States v. Sabatino, 485 F. 2d 540 288
United States v. Sher, 657 U.S. 28 284
United States v. Shimer, 367 U.S. 374 154
United States v. South-Eastern Underwriters Assn., 322 U.S. 533 135, 954
United States v. Southwestern Cable Co., 392 U.S. 157 162
United States v. Stoddart, 574 F. 2d 1050 294, 305
United States v. Street, 529 F. 2d 226 300
United States v. Thirty-seven Photographs, 402 U.S. 363 769
United States v. Topco Associates, Inc., 405 U.S. 596 126
United States v. Turkette, 452 U.S. 576 293, 301–303, 305
United States v. Universal C. I. T. Credit Corp., 344 U.S. 218 290
United States v. Venable, 585 F. 2d 71 274
United States v. Wheeler, 435 U.S. 313 857
United States v. Will, 449 U.S. 200 58, 59
United States v. Wong Kim Ark, 169 U.S. 649 385
United States v. Yazell, 382 U.S. 341 512
United States ex rel. Bryant v. Houston, 273 F. 915 523
United States ex rel. Funaro v. Watchorn, 164 F. 152 523
United States ex rel. Toth v. Quarles, 350 U.S. 11 59, 67, 70, 73
United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 310, 312, 320, 357
University of California Regents v. Bakke, 438 U.S. 265 410, 472, 491, 492
Vaca v. Sipes, 386 U.S. 171 394

Page

Vance v. Bradley, 440 U.S. 93 23, 665
Ventiadis v. C. J. Thibodeaux & Co., 295 F. Supp. 135 585
Victoria, The, 76 F. Supp. 54 585
Village. See name of village.
Virginia, Ex parte, 100 U.S. 339 732
Vlandis v. Kline, 412 U.S. 441 5, 6, 9, 48
Vorchheimer v. School Dist. of Philadelphia, 532 F. 2d 880 720
Wainwright v. Stone, 414 U.S. 21 767
Wainwright v. Torna, 455 U.S. 586 972
Wales v. Whitney, 114 U.S. 564 519
Wallace v. Adams, 204 U.S. 415 65
Wallace v. Hines, 253 U.S. 66 320, 328, 332, 363
Walz v. Tax Comm'n, 397 U.S. 664 486
Ward v. Illinois, 431 U.S. 767 755
Ward v. Village of Monroeville, 409 U.S. 57 86
Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 837, 843, 846
Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 844, 853, 854
Washington v. Davis, 426 U.S. 229 390, 484, 485, 538, 544, 545, 617, 618, 621, 631, 642
Washington v. Seattle School Dist. No. 1, 458 U.S. 457 536, 545–548, 551–558, 560–562
Washington v. Texas, 388 U.S. 14 867, 875
Watt v. Energy Action Educational Foundation, 454 U.S. 151 402
Watts v. United States, 394 U.S. 705 911, 928
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 439
Weber v. Garza, 570 F. 2d 511 523
Weems v. United States, 217 U.S. 349 788, 800, 812
Weinberger v. Romero-Barcelo, 456 U.S. 305 586

Page

Weinberger v. Salfi, 422 U.S. 749 6, 48
Weinberger v. Wiesenfeld, 420 U.S. 636 726, 728, 730, 740
Weinstein v. Bradford, 423 U.S. 147 187
Wellenkamp v. Bank of America, 21 Cal. 3d 943 148–150, 154–156, 159, 169–171
Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 724, 726, 740, 742
West v. Kansas Natural Gas Co., 221 U.S. 229 947, 948, 963
Western Maid, The, 257 U.S. 419 710
Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 943
Western Union Telegraph Co. v. Pennsylvania R. Co., 195 U.S. 540 429, 430
Whalen v. Roe, 423 U.S. 1313 1302
Whalen v. Roe, 429 U.S. 589 759
Wheeling Steel Corp. v. Fox, 298 U.S. 193 347
Whippany Paper Board Co., In re, 15 B. R. 312 54
Whitcomb v. Chavis, 403 U.S. 124 617, 619, 620, 624, 627, 629, 638, 650
White v. Regester, 412 U.S. 755 467, 617, 619, 620, 622, 624, 627, 649
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 834, 836–839, 841–846, 848–854
Whitfield v. Ohio, 297 U.S. 431 960
Whitney v. California, 274 U.S. 357 928
Wickard v. Filburn, 317 U.S. 111 962
William L., In re, 477 Pa. 322 503, 505, 525
Williams v. Austrian, 331 U.S. 642 72
Williams v. DeKalb County, 582 F. 2d 2 383
Williams v. First Federal Sav. & Loan Assn., 651 F. 2d 910 169
Williams v. Lee, 358 U.S. 217 837, 843, 848
Williams v. McNair, 316 F. Supp. 134 739, 742, 743

Page

Williams v. Rhodes, 393 U.S. 23 636, 733

Williams v. Standard Oil Co., 278 U.S. 235 96

Williams v. United States, 289 U.S. 553 63, 69, 110–112

Wisconsin v. J. C. Penney Co., 311 U.S. 435 315, 328, 332

Witherspoon v. Illinois, 391 U.S. 510 811

Wood v. Strickland, 420 U.S. 308 969–971

Woodson v. North Carolina, 428 U.S. 280 798, 811, 814, 817, 823, 827, 830

Woolworth Co. v. Taxation & Revenue Dept., 458 U.S. 354 328

Wright v. Rockefeller, 376 U.S. 52 617, 645, 652

Wyoming v. Colorado, 259 U.S. 419 603

Page

Wyoming v. Colorado, 353 U.S. 953 956, 962

Yazoo & M. V. R. Co. v. Jackson Vinegar Co., 226 U.S. 217 767

Young, Ex parte, 209 U.S. 123 684, 685, 697, 702, 704, 706

Young v. American Mini Theatres, Inc., 427 U.S. 50 648, 763, 781

Younger v. Harris, 401 U.S. 37 733, 1113–1115

YMCA v. United States, 395 U.S. 85 432

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 83

Zimmer v. McKeithen, 485 F. 2d 1297 619–622, 624

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 233, 399, 404

Zobel v. Williams, 457 U.S. 55 497, 650

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1981

TOLL, PRESIDENT, UNIVERSITY OF MARYLAND, ET AL. *v.* MORENO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80–2178. Argued March 2, 1982—Decided June 28, 1982

Held: The University of Maryland's policy of categorically denying domiciled nonimmigrant aliens who hold G–4 visas (visas issued to nonimmigrant aliens who are officers or employees of certain international organizations and to members of their immediate families) in-state status under which preferential treatment is given to domiciled citizen and immigrant alien students for purposes of tuition and fees, is invalid under the Supremacy Clause. Pp. 10–19.

(a) "[S]tate regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *De Canas* v. *Bica*, 424 U. S. 351, 358, n. 6. Here, in light of Congress' explicit decision in the Immigration and Nationality Act of 1952 not to bar G–4 aliens from acquiring domicile in the United States, the State's decision to deny "in-state" status to G–4 aliens, *solely* on account of such aliens' immigration status, amounts to an ancillary "burden not contemplated by Congress" in admitting these aliens to the United States. Moreover, by imposing on domiciled G–4 aliens higher tuition and fees than are imposed on other domiciliaries of the State, the University's policy frustrates the federal policies embodied in the special tax exemptions afforded G–4 aliens by various treaties, international agreements, and federal statutes. Pp. 10–17.

(b) The Eleventh Amendment did not preclude the District Court from ordering the University to pay refunds to various G-4 alien class members who would have obtained in-state status but for the stay, pending appeal, of that court's original order granting partial summary judgment in favor of the named plaintiffs, where the University, in seeking the stay, represented that if the order was affirmed on appeal, it would make appropriate refunds. Contrary to petitioners' contention, the order was not vacated when this Court vacated the Court of Appeals' judgment affirming the District Court and remanded the case to the District Court for reconsideration. Pp. 17–19.

645 F. 2d 217, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 19. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, *post*, p. 24. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 25.

Robert A. Zarnoch, Assistant Attorney General of Maryland, argued the cause for petitioners. With him on the briefs was *Stephen H. Sachs*, Attorney General.

James R. Bieke argued the cause for respondents. With him on the brief was *John Townsend Rich*.*

---

*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by the Attorneys General for their respective States as follows: *Charles A. Graddick* of Alabama, *Wilson L. Condon* of Alaska, *Robert K. Corbin* of Arizona, *John Steven Clark* of Arkansas, *George Deukmejian* of California, *J. D. MacFarlane* of Colorado, *Carl R. Ajello* of Connecticut, *Richard S. Gebelein* of Delaware, *Jim Smith* of Florida, *Arthur K. Bolton* of Georgia, *Tany S. Hong* of Hawaii, *David H. Leroy* of Idaho, *Tyrone C. Fahner* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *Steven L. Beshear* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Francis X. Bellotti* of Massachusetts, *Frank J. Kelley* of Michigan, *Warren R. Spannaus* of Minnesota, *William A. Allain* of Mississippi, *John D. Ashcroft* of Missouri, *Michael T. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Richard H. Bryan* of Nevada, *Gregory H. Smith* of New Hampshire, *James R. Zazzali* of New Jersey, *Jeff Bingaman* of New Mexico, *Robert Abrams* of New York, *Rufus L. Edmisten* of North Carolina, *Robert Wefald* of North Dakota, *William J. Brown* of Ohio, *Jan Eric Cartwright* of Oklahoma, *Dave Frohnmayer* of Oregon, *LeRoy S. Zimmerman* of Pennsylvania, *Dennis J. Roberts II* of Rhode Island, *Daniel R. McLeod*

JUSTICE BRENNAN delivered the opinion of the Court.

The state-operated University of Maryland grants preferential treatment for purposes of tuition and fees to students with "in-state" status. Although citizens and immigrant aliens may obtain in-state status upon a showing of domicile within the State, nonimmigrant aliens, even if domiciled, are not eligible for such status. The question in this case is whether the University's in-state policy is invalid under the Supremacy Clause of the Constitution, insofar as the policy categorically denies in-state status to domiciled nonimmigrant aliens who hold G-4 visas.

I

The factual and procedural background of this case, which has prompted two prior decisions of this Court, requires some elaboration. The focus of the controversy has been a policy adopted by the University in 1973 governing the eligibility of students for in-state status with respect to admission and fees. The policy provides in relevant part:

> "1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:

---

of South Carolina, *Mark V. Meierhenry* of South Dakota, *William J. Leech, Jr.*, of Tennessee, *Mark White* of Texas, *David L. Wilkinson* of Utah, *John J. Easton* of Vermont, *J. Marshall Coleman* of Virginia, *Kenneth O. Eikenberry* of Washington, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Steven Freudenthal* of Wyoming; and for the American Council on Education et al. by *Sheldon Elliot Steinbach.*

Bruce J. Ennis, *Donald N. Bersoff*, and *Paul R. Friedman* filed a brief for the International Bank for Reconstruction and Development et al. as *amici curiae* urging affirmance.

> "a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.
>
> "b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester." App. to Pet. for Cert. 167a–168a.

In 1975, when this action was filed, respondents Juan Carlos Moreno, Juan Pablo Otero, and Clare B. Hogg were students at the University of Maryland. Each resided with, and was financially dependent on, a parent who was a nonimmigrant alien holding a "G-4" visa. Such visas are issued to nonimmigrant aliens who are officers or employees of certain international organizations, and to members of their immediate families. 66 Stat. 168, 8 U. S. C. § 1101(a)(15)(G)(iv).[1] Despite respondents' residence in the State, the University denied them in-state status pursuant to its policy of excluding all nonimmigrant aliens. Seeking declaratory and injunctive relief, the three respondents filed a class action against the University of Maryland and its President.[2] They contended that the University's policy violated various federal laws, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Supremacy Clause.

---

[1] The international organizations covered by the provision are those that are entitled to the privileges, exemptions, and immunities conferred under the International Organizations Immunities Act, 59 Stat. 669, 22 U. S. C. § 288 *et seq.* At the time suit was brought, the named plaintiffs in this case were dependents of employees of either the Inter-American Development Bank or the International Bank for Reconstruction and Development (World Bank).

[2] A fourth individual, Rene Otero, Jr., a respondent in this Court, was made a named plaintiff in 1980 when a supplemental complaint was filed.

The District Court granted partial summary judgment in favor of the three named plaintiffs and the class of G–4 visaholders represented by them.[3] In the view of the District Court, the University's denial of in-state status to these plaintiffs rested upon an irrebuttable presumption that a G–4 alien cannot establish Maryland domicile. Concluding that the presumption was "not universally true" as a matter of either federal or Maryland law, the District Court held that under *Vlandis* v. *Kline,* 412 U. S. 441 (1973), the in-state policy violated the Due Process Clause of the Fourteenth Amendment. *Moreno* v. *University of Maryland,* 420 F. Supp. 541, 559 (Md. 1976). Accordingly, in an order dated July 13, 1976, the District Court enjoined the President of the University[4] from denying respondents the opportunity to establish in-state status *solely* on the basis of an "irrebuttable presumption of non-domicile." *Id.,* at 565.[5] The court stayed its order pending appeal in reliance on the University's representation that it would make appropriate refunds "in the event the Court's Order of July 13, 1976, were finally affirmed on appeal." App. to Pet. for Cert. 100a. The Court of Appeals for the Fourth Circuit affirmed, adopting the reasoning of the District Court. *Id.*, at 102a.[6] Affirmance order reported at 556 F. 2d 573 (1977).

---

[3] The court certified a class of G–4 visaholders or their dependents who, "residing in Maryland, . . . are current students at the University of Maryland, or . . . chose not to apply to the University of Maryland because of the challenged policies but would now be interested in attending if given an opportunity to establish 'in-state' status, or . . . are currently students in senior high schools in Maryland." *Moreno* v. *University of Maryland,* 420 F. Supp. 541, 563 (Md. 1976).

[4] Citing *Monroe* v. *Pape,* 365 U. S. 167 (1961), the District Court dismissed the claim against the University itself. 420 F. Supp., at 548–550. The plaintiffs did not appeal that dismissal.

[5] The District Court did not order the University to grant the named plaintiffs in-state status. Rather, it merely barred the University from denying them and the members of the class "the opportunity to demonstrate that they or any of them are entitled to 'in-state' status for purposes of tuition and charge differential determinations." *Id.,* at 565.

We reviewed the case on writ of certiorari. *Elkins* v. *Moreno*, 435 U. S. 647 (1978). We held that "[b]ecause petitioner makes domicile the 'paramount' policy consideration and because respondents' contention is that they can be domiciled in Maryland but are conclusively presumed to be unable to do so, this case is squarely within *Vlandis* as limited by [*Weinberger* v.] *Salfi*, [422 U. S. 749 (1975)]." *Id.*, at 660.[7] It was therefore necessary to decide whether the presumption was universally true. With respect to federal law, we concluded that G-4 visaholders could "adopt the United States as their domicile." *Id.*, at 666.[8] We were thus left with the "potentially dispositive" question whether G-4 aliens are as a matter of state law incapable of becoming domiciliaries of Maryland. We certified this question to the Maryland Court of Appeals.[9] The state court answered the certified question in the negative, advising us that "nothing in the general Maryland law of domicile renders G–4 visa holders, or their dependents, incapable of becoming domiciled in this State." *Toll* v. *Moreno*, 284 Md. 425, 444, 397 A. 2d 1009, 1019 (1979).

---

[6] The Court of Appeals stayed its mandate "on the same terms as the district court originally granted its stay." App. to Pet. for Cert. 103a-104a.

[7] *Salfi* limited *Vlandis* "to those situations in which a State 'purport[s] to be concerned with [domicile, but] at the same time den[ies] to one seeking to meet its test of [domicile] the opportunity to show factors clearly bearing on that issue.'" *Elkins* v. *Moreno*, 435 U. S., at 660, quoting *Weinberger* v. *Salfi*, 422 U. S. 749, 771 (1975).

[8] We noted that as to some categories of nonimmigrant aliens, Congress had "expressly conditioned admission . . . on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States." 435 U. S., at 665. See, *e. g.*, 8 U. S. C. §§ 1101(a)(15)(B), (F), (H). With respect to G-4 nonimmigrant aliens, however, we concluded that Congress had deliberately declined to "impose restrictions on intent," thereby permitting them to "adopt the United States as their domicile." 435 U. S., at 666.

[9] The certified question was phrased as follows:

"Are persons residing in Maryland who hold or are named in a visa under 8 U. S. C. § 1101(a)(15)(G)(iv) (1976 ed.), or who are financially dependent upon a person holding or named in such a visa, incapable as a matter of state law of becoming domiciliaries of Maryland?" *Id.*, at 668-669 (footnote omitted).

After our certification, but before the state court's response, the University adopted a "clarifying resolution" concerning its in-state policy.[10] By its terms the resolution did not offer a new definition of "in-state" students; rather, it purported to "reaffirm" the existing policy.[11] The resolution indicated, however, that the University's policy, "insofar as it denies in-state status to nonimmigrant aliens, serves a number of substantial purposes and interests, whether or not it conforms to the generally or otherwise applicable definition of domicile under the Maryland common law." App. to Pet. for Cert. 173a. The interests assertedly served by the policy were described in the following terms:

> "(a) limiting the University's expenditures by granting a higher subsidy toward the expenses of providing educational services to that class of persons who, as a class, are more likely to have a close affinity to the State and to contribute more to its economic well-being;
>
> "(b) achieving equalization between the affected classes of the expenses of providing educational services;
>
> "(c) efficiently administering the University's in-state determination and appeals process; and

---

[10] It was entitled "A Resolution Clarifying the Purposes, Meaning, and Application of the Policy of the University of Maryland for Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes, Insofar as It Denies In-State Status to Nonimmigrant Aliens." App. to Pet. for Cert. 172a.

[11] "*Reaffirmation of In-State Policy.* Regardless of whether or not the policy approved by the Board of Regents on September 21, 1973, conforms with the generally or otherwise applicable definition of domicile under the Maryland common law, the Board of Regents reaffirms that policy . . . ." *Id.*, at 174a.

> "(d) preventing disparate treatment among categories of nonimmigrants with respect to admissions, tuition, and charge-differentials." *Id.*, at 173a–174a.

Following the Maryland Court of Appeals' decision, the case returned to this Court. But we declined to restore the case to the active docket for full briefing and argument, concluding that the University's clarifying resolution had "fundamentally altered the posture of the case." *Toll* v. *Moreno*, 441 U. S. 458, 461 (1979) *(per curiam)*. We noted that "if domicile [was] not the 'paramount' policy consideration of the University, this case [was] no longer 'squarely within *Vlandis* as limited by *Salfi*,'" and thus raised "new issues of constitutional law which should be addressed in the first instance by the District Court." *Id.*, at 461–462, quoting *Elkins* v. *Moreno*, *supra*, at 660.[12] Accordingly, we vacated the judgment of the Court of Appeals and remanded the case "to the District Court for further consideration in light of our opinion and judgment in *Elkins*, the opinion and judgment of the Maryland Court of Appeals in *Toll*, and the Board of Regents' clarifying resolution of June 23, 1978." 441 U. S., at 462.

On remand, the District Court determined that the clarifying resolution constituted a change in the University's position. Before that resolution, the University's primary concern had in fact been domicile; after the resolution, domicile was no longer "the paramount consideration in the University's policy." 480 F. Supp. 1116, 1124 (Md. 1979). Thus, with respect to the period preceding the issuance of the resolution, the District Court reaffirmed its earlier determination that insofar as the policy precluded G–4 aliens (or their dependents) from acquiring in-state status, it denied due process under *Vlandis*. 480 F. Supp., at 1122–1125. With respect to the period following the promulgation of the resolution, however, the court held that *Vlandis* did not control: The University had abandoned its position that G–4 aliens could not establish domicile in Maryland. 480 F. Supp., at 1125. Nevertheless, the District Court concluded that the revised in-state policy was constitutionally invalid, basing its conclusion on two alternative grounds. First, the court held that the policy ran afoul of the Equal Protection Clause of the Fourteenth Amendment. According to the court, the challenged portion of the University's policy contained a classification based on alienage, requiring strict scrutiny, an analysis which the policy did not survive, since the policy did not further any compelling interest. 489 F. Supp. 658, 660–667 (Md. 1980). Alternatively, the court held that the in-state policy violated the Supremacy Clause by encroaching upon Congress' prerogatives with respect to the regulation of immigration. *Id.*, at 667–668.[13]

---

[12] We further noted:

"Our decision in *Elkins* rests on the premise that 'the University apparently has no interest in continuing to deny in-state status to G–4 aliens as a class if they can become Maryland domiciliaries since it has indicated both here and in the District Court that it would redraft its policy "to accommodate" G–4 aliens were the Maryland courts to hold that G–4 aliens can' acquire such domicile. 435 U. S., at 661. After the clarifying resolution, this premise no longer appears to be true." 441 U. S., at 461.

The Court of Appeals affirmed for "reasons sufficiently stated" by the District Court. *Moreno* v. *University of Maryland*, 645 F. 2d 217, 220 (1981) *(per curiam)*. We granted certiorari. 454 U. S. 815 (1981). For the reasons that follow, we hold that the University of Maryland's in-state policy, as applied to G–4 aliens and their dependents, violates the Supremacy Clause of the Constitution,[14] and on that ground affirm the judgment of the Court of Appeals. We therefore have no occasion to consider whether the policy violates the Due Process or Equal Protection Clauses.

---

[13] The District Court's pre-emption holding rested in part on its equal protection analysis; according to the court, "the standard utilized to uphold a state regulation dealing with benefits to be accorded to aliens is essentially the strict scrutiny analysis" of equal protection. 489 F. Supp., at 668.

[14] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made,

II

Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders. See, *e. g., Mathews* v. *Diaz*, 426 U. S. 67 (1976); *Graham* v. *Richardson*, 403 U. S. 365, 377–380 (1971); *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 418–420 (1948); *Hines* v. *Davidowitz*, 312 U. S. 52, 62–68 (1941); *Truax* v. *Raich*, 239 U. S. 33, 42 (1915). Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power "[t]o establish [a] uniform Rule of Naturalization," U. S. Const., Art. I, § 8, cl. 4, its power "[t]o regulate Commerce with foreign Nations", *id.*, cl. 3, and its broad authority over foreign affairs, see *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 (1936); *Mathews* v. *Diaz, supra*, at 81, n. 17; *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 588–589 (1952).

Not surprisingly, therefore, our cases have also been at pains to note the substantial limitations upon the authority of the States in making classifications based upon alienage. In *Takahashi* v. *Fish & Game Comm'n, supra*, we considered a California statute that precluded aliens who were "ineligible for citizenship under federal law" from obtaining commercial fishing licenses, even though they "met all other state requirements" and were lawful inhabitants of the State. 334 U. S., at 414.[15] In seeking to defend the statute, the State

---

under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

[15] At the time *Takahashi* was decided, federal law "permitted Japanese and certain other non-white racial groups to enter and reside in the coun-

argued that it had "simply followed the Federal Government's lead" in classifying certain persons as "ineligible for citizenship." *Id.*, at 418. We rejected the argument, stressing the delicate nature of the federal-state relationship in regulating aliens:

> "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. *State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.*" *Id.*, at 419 (emphasis added) (citation and footnote omitted).[16]

---

try, but . . . made them ineligible for United States citizenship." 334 U. S., at 412 (footnote omitted).

[16] JUSTICE REHNQUIST, in dissent, suggests that the italicized language should not be interpreted literally. *Post*, at 28–29. Rather, he suggests, the language can only be understood as explaining three prior Court cases that *Takahashi* cited in a footnote immediately after the italicized language. 334 U. S., at 419, n. 6, citing *Truax* v. *Raich*, 239 U. S. 33 (1915), *Chy Lung* v. *Freeman*, 92 U. S. 275, 280 (1876), and *Hines* v. *Davidowitz*, 312 U. S. 52, 65–68 (1941). According to JUSTICE REHNQUIST, "in each of these cases, the Court found either a clear encroachment on exclusive federal power to admit aliens into the country or a clear conflict with a specific congressional purpose." *Post*, at 29. JUSTICE REHNQUIST thus concludes that the language in *Takahashi* does not mean what it says; instead it means that absent a clear encroachment on exclusive federal power or clear conflict with a federal statute, the States are free to treat aliens as they will. JUSTICE REHNQUIST is wrong. If the language were read in the manner suggested by the dissent, it would fail to explain *Takahashi*

The decision in *Graham* v. *Richardson*, *supra*, followed directly from *Takahashi*. In *Graham* we held that a State may not withhold welfare benefits from resident aliens "merely because of their alienage." 403 U. S., at 378. Such discrimination, the Court concluded, would not only violate the Equal Protection Clause, but would also encroach upon federal authority over lawfully admitted aliens. In support of the latter conclusion, the Court noted that Congress had "not seen fit to impose any burden or restriction on aliens who become indigent after their entry into the United States," *id.*, at 377, but rather had chosen to afford "lawfully admitted resident aliens . . . the full and equal benefit of all state laws for the security of persons and property," *id.*, at 378. The States had thus imposed an "auxiliary burde[n] upon the entrance or residence of aliens" that was never contemplated by Congress. *Id.*, at 379.

Read together, *Takahashi* and *Graham* stand for the broad principle[17] that "state regulation not congressionally sanc-

---

itself: The California statute at issue in *Takahashi*, denying certain lawful aliens the right to obtain commercial fishing licenses from the State, presented neither "a clear encroachment on exclusive federal power to admit aliens" nor "a clear conflict with a specific congressional purpose." JUSTICE REHNQUIST's *non*literal interpretation of the *Takahashi* holding is simply wishful thinking on his part.

While pre-emption played a significant role in the Court's analysis in *Takahashi*, the actual basis for invalidation of the California statute was apparently the Equal Protection Clause of the Constitution. Commentators have noted, however, that many of the Court's decisions concerning alienage classifications, such as *Takahashi*, are better explained in preemption than in equal protection terms. See, *e. g.*, Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1060–1065 (1979); Note, The Equal Treatment of Aliens: Preemption or Equal Protection?, 31 Stan. L. Rev. 1069 (1979).

[17] Our cases do recognize, however, that a State, in the course of defining its political community, may, in appropriate circumstances, limit the participation of noncitizens in the States' political and governmental functions. See, *e. g.*, *Cabell* v. *Chavez-Salido*, 454 U. S. 432 (1982); *Ambach* v. *Norwick*, 441 U. S. 68, 72–75 (1979); *Foley* v. *Connelie*, 435 U. S. 291, 295–296 (1978); *Sugarman* v. *Dougall*, 413 U. S. 634, 646–649 (1973).

tioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." *De Canas* v. *Bica*, 424 U. S. 351, 358, n. 6 (1976).[18] To be sure, when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of the principle is likely to be a matter of some dispute. But the instant case does not present such a situation, and there can be little doubt regarding the invalidity of the challenged portion of the University's in-state policy.

The Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* (1976 ed. and Supp. IV), represents "a comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents." *Elkins* v. *Moreno*, 435 U. S., at 664. The Act recognizes two basic classes of aliens, immigrant and nonimmigrant.[19] With respect to the nonimmigrant class,

---

[18] In *De Canas*, we considered whether a California statute making it unlawful in some circumstances to employ *illegal* aliens was invalid under the Supremacy Clause. We upheld the statute. JUSTICE REHNQUIST's dissent in the present case suggests that the pre-emption claim was rejected in *De Canas* because "the Court found no strong evidence that Congress intended to pre-empt" the State's action. *Post*, at 31. JUSTICE REHNQUIST has misread *De Canas*. We rejected the pre-emption claim not because of an absence of congressional intent to pre-empt, but because Congress *intended* that the States be allowed, "to the extent consistent with federal law, [to] regulate the employment of illegal aliens." 424 U. S., at 361.

[19] Immigrant aliens are subject to stricter qualitative tests than nonimmigrant aliens. See E. Harper, Immigration Laws of the United States 228 (3d ed. 1975). And whereas there are no quantitative restrictions on the admission of nonimmigrant aliens, there are, with a few exceptions, quota limitations for immigrant aliens. See 8 U. S. C. § 1151(a) (1976 ed., Supp. IV); Harper, *supra*, at 228. As we noted in *Elkins* v. *Moreno:*

"Congress defined nonimmigrant classes to provide for the needs of international diplomacy, tourism, and commerce, each of which requires that aliens be admitted to the United States from time to time and all of which would be hampered if every alien entering the United States were subject the Act establishes various categories, the G–4 category among them. For many of these nonimmigrant categories, Congress has precluded the covered alien from establishing domicile in the United States. *Id.*, at 665.[20] But significantly, Congress has allowed G–4 aliens—employees of various international organizations, and their immediate families—to enter the country on terms permitting the establishment of domicile in the United States. *Id.*, at 666. In light of Congress' explicit decision not to bar G–4 aliens from acquiring domicile, the State's decision to deny "in-state" status to G–4 aliens, *solely* on account of the G–4 alien's federal immigration status, surely amounts to an ancillary "burden not contemplated by Congress" in admitting these aliens to the United States. We need not rely, however, simply on Congress' decision to permit the G–4 alien to establish domicile in this country; the Federal Government has also taken the additional affirmative step of conferring special tax privileges on G–4 aliens.

As a result of an array of treaties, international agreements, and federal statutes, G–4 visaholders employed by the international organizations described in 8 U. S. C. § 1101(a)(15)(G)(iv) are relieved of federal and, in many instances, state and local taxes on the salaries paid by the organizations. For example, the international agreements governing the international banks for which the parents of the named respondents are employed specifically exempt the parents from all taxes on their organizational salaries. See Articles of Agreement of the International Bank for Reconstruction and Development, Art. VII, § 9(b), 60 Stat. 1458, T. I. A. S. No. 1502 (1945) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to ex-

---

to a quota and to the more strict entry conditions placed on immigrant aliens." 435 U. S., at 665 (footnote omitted).

[20] See, *e. g.*, 8 U. S. C. § 1101(a)(15)(B) (temporary visitors for pleasure or business); § 1101(a)(15)(C) (aliens in transit); § 1101(a)(15)(F) (foreign students); § 1101(a)(15)(H) (temporary workers).

ecutive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals"); Agreement Establishing the Inter-American Development Bank, Art. XI, § 9(b), [1959] 10 U. S. T. 3029, 3096, T. I. A. S. No. 4397 (1959) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to . . . employees of the Bank who are not local citizens or other local nationals").[21] Not only have some of the specific tax exemptions contained in international agreements been incorporated into a federal statute, see 22 U. S. C. § 286h, but also the International Organizations Immunities Act has explicitly afforded a federal tax exemption for those G-4 visaholders employed by international organizations for which no treaty or international agreement has provided a tax exemption for foreign employees.[22] § 4(b), 59 Stat. 670, reenacted, 68A Stat. 284, as § 893 of the Internal Revenue

---

[21] Among the similar agreements pertaining to other international organizations are the following: Articles of Agreement of the International Finance Corporation, Art. VI, § 9(b), [1956] 7 U. S. T. 2197, 2216, T. I. A. S. No. 3620 (1955) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Corporation to . . . employees of the Corporation who are not local citizens, local subjects, or other local nationals"); Articles of Agreement of the International Development Association, Art. VIII, § 9(b), [1960] 11 U. S. T. 2284, 2306, T. I. A. S. No. 4607 (1960) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Association to . . . employees of the Association who are not local citizens, local subjects, or other local nationals"); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 24, § 2, [1966] 17 U. S. T. 1270, 1279, T. I. A. S. No. 6090 (1965) ("Except in the case of local nationals, no tax shall be levied . . . on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat"); Articles of Agreement of the International Monetary Fund, Art. IX, § 9(b), 60 Stat. 1414, T. I. A. S. No. 1501 (1945) ("No tax shall be levied on or in respect of salaries and emoluments paid by the Fund to . . . employees of the Fund who are not local citizens, local subjects, or other local nationals").

[22] And by virtue of Md. Ann. Code, Art. 81, § 280(a) (1980), this group of G-4 visaholders is able to shield organizational income from Maryland income tax.

Code of 1954, 26 U. S. C. §893 ("Wages, fees, or salary of any employee [except citizens of the United States and of the Republic of the Philippines] of . . . an international organization . . . , received as compensation for official services to such . . . international organization shall not be included in gross income and shall be exempt from [federal] taxation").

In affording G-4 visaholders such tax exemption, the Federal Government has undoubtedly sought to benefit the employing international organizations by enabling them to pay salaries not encumbered by the full panoply of taxes, thereby lowering the organizations' costs. See 41 Op. Atty. Gen. 170, 172–173 (1954). The tax benefits serve as an inducement for these organizations to locate significant operations in the United States. See, *e. g.*, H. R. Rep. No. 1203, 79th Cong., 1st Sess., 2–3 (1945); S. Rep. No. 861, 79th Cong., 1st Sess., 2–3 (1945). By imposing on those G-4 aliens who are domiciled in Maryland higher tuition and fees than are imposed on other domiciliaries of the State, the University's policy frustrates these federal policies. Petitioners' very argument in this Court only buttresses this conclusion. One of the grounds on which petitioners have sought to *justify* the discriminatory burden imposed on the named respondents is that the salaries their parents receive from the international banks for which they work are exempt from Maryland income tax. Indeed, petitioners suggest that the "dollar differential . . . at stake here [is] an amount roughly equivalent to the amount of state income tax an international bank parent is spared by treaty each year." Brief for Petitioners 23 (footnote omitted). But to the extent this is indeed a justification for the University's policy with respect to the named respondents, it is an impermissible one: The State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the State from collecting.[23]

---

[23] Petitioners point out that the international banks for which the named respondents' parents work provide reimbursement for the difference be-

In sum, the Federal Government has not merely admitted G–4 aliens into the country; it has also permitted them to establish domicile and afforded significant tax exemptions on organizational salaries. In such circumstances, we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification.[24] We therefore conclude that insofar as it bars domiciled G–4 aliens (and their dependents) from acquiring in-state status, the University's policy violates the Supremacy Clause.[25]

III

Finally, we must address petitioners' contention that the Eleventh Amendment precluded the District Court from ordering the University to pay refunds to various class members who would have obtained in-state status but for the stay of the District Court's original order of July 13, 1976. As petitioners concede, in seeking a stay of that order the Univer-

---

tween in-state and out-of-state tuition. Certainly, this fact does not assist—but undermines—petitioners' argument. Such reimbursements only add to the employment costs of the international organizations, thereby frustrating the federal intention of benefiting the international organizations.

[24] Some members of the class represented by the respondents derive their state tax exemption not from a treaty or international agreement, but from the combination of federal and state statutes. See *supra*, at 15–16, and n. 22. As to these G–4 aliens, it is true, as the dissent notes, *post*, at 34–35, that the Federal Government has not precluded the collection of a state income tax that is imposed on domiciliaries of the State. But even with respect to this group of G–4 aliens, the Federal Government has taken the affirmative steps of permitting the establishment of domicile and of providing federal income tax exemption on organizational salaries. This special status afforded by the Federal Government is, in our view, inconsistent with the University of Maryland's *discriminatory* denial of in-state status to G–4 aliens who are domiciled in the State.

[25] It is important to note that this case does not involve, and we express no views regarding, a State's imposition of a burden on all individuals sharing a common relevant characteristic, of whom only some are aliens.

sity made the representation to the District Court that in the event the 1976 order was "finally affirmed on appeal," it would make appropriate refunds. This representation was incorporated in the stay orders of both the District Court and Court of Appeals. It is petitioners' contention, however, that the 1976 order was "effectively" vacated when this Court, in *Toll* v. *Moreno*, 441 U. S. 458 (1979), vacated the judgment of the Court of Appeals and remanded the case to the District Court for reconsideration. Petitioners therefore conclude that the terms of the University's waiver of sovereign immunity can no longer be satisfied.

Petitioners' argument is not persuasive. We do not interpret *Toll* as having vacated the judgment of the District Court. In *Toll* the Court recognized that the University had altered its position through the promulgation of the clarifying resolution, raising "new issues of constitutional law which should be addressed in the first instance by the District Court." *Id.*, at 462. The Court declined, however, to decide whether the District Court, in issuing its 1976 order, had improperly relied on due process grounds, and whether continuation of the order was justified on equal protection or pre-emption grounds. Thus, while we vacated "the judgment of the Court of Appeals," *ibid.*, we left the judgment of the District Court undisturbed.[26] And contrary to petitioners' suggestion, a vacatur of the District Court's judgment was not necessary to give the District Court jurisdiction to reconsider the case. See *Goldberg* v. *United States*, 425

---

[26] Petitioners note, however, that whereas the District Court's 1976 order was based solely on due process grounds, the District Court, on remand, held the in-state policy as it operated during the period following the clarifying resolution invalid on two different grounds—equal protection and pre-emption. In our view, this fact is of little moment. Just as a respondent is entitled to defend in this Court a judgment on grounds different from those relied on by the court below, *e. g.*, *Colautti* v. *Franklin*, 439 U. S. 379, 397, n. 16 (1979), respondents in this case were entitled, following our remand, to support a reaffirmance of the earlier order on grounds previously urged but not relied on.

U. S. 94, 111–112 (1976); *Campbell* v. *United States*, 365 U. S. 85, 98–99 (1961); 28 U. S. C. §2106 ("The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment . . . and may . . . require such further proceedings to be had as may be just under the circumstances").[27]

IV

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion. Its action today provides an eloquent and sufficient answer to JUSTICE REHNQUIST's dissent: despite the vehemence with which his opinion is written, JUSTICE REHNQUIST has persuaded only one Justice to his position. But because the dissent attempts to plumb the Court's psyche, see *post*, at 41–42, n. 12,[1] I feel compelled to add comments addressed to JUSTICE REHNQUIST's ruminations on equal protection. In particular, I cannot leave unchallenged his suggestion that the Court's decisions holding resident aliens to be a "suspect class" no longer are good law.

JUSTICE REHNQUIST's analysis on this point is based on a simple syllogism. Alienage classifications have been subjected to strict scrutiny, he suggests, because "aliens [are] barred from asserting their interests in the governmental body responsible for imposing burdens upon them." *Post,* at 40. But "[m]ore recent decisions," he continues, have established that "the political powerlessness of aliens is itself the consequence of distinctions on the basis of alienage that are constitutionally permissible." *Ibid.* This prompts JUSTICE REHNQUIST to pose what one supposes to be a rhetorical question: "whether political powerlessness is any longer a legitimate reason for treating aliens as a 'suspect class' deserving of 'heightened judicial solicitude.'" *Post,* at 41. The reader would infer from this analysis that JUSTICE REHNQUIST would uphold state enactments disadvantaging aliens unless those enactments are wholly irrational.

---

[27] Even if we were to assume that the judgment of the District Court was indeed vacated, we could not say that the terms of the University's waiver of sovereign immunity—that the District Court's order be "finally affirmed on appeal"—would not be satisfied. Petitioners have not prevailed on the merits in a single court, despite the numerous decisions that this litigation has prompted. By its original order, the District Court held that the University's in-state policy was invalid insofar as it discriminated against G–4 aliens. Today, we reaffirm that conclusion.

[1] The Justice opines that "[i]f the Court has eschewed strict scrutiny in the 'political process' [alienage-equal protection] cases, it may be because the Court is becoming uncomfortable with the categorization of aliens as a suspect class." *Post*, at 42, n. 12.

With respect, in my view it is JUSTICE REHNQUIST's analysis that is wholly irrational; simply to state his proposition is to demonstrate its logical flaws. Most obviously, his exegesis of the Court's reasons for according aliens "suspect class" status is simplistic to the point of caricature. By labeling aliens a "'discrete and insular' minority," *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971), the Court did something more than provide a historical description of their political standing. That label also reflected the Court's considered conclusion that for most legislative purposes there simply are no meaningful differences between resident aliens and citizens, see *Ambach* v. *Norwick,* 441 U. S. 68, 75 (1979), so that aliens and citizens are "persons similarly circumstanced" who must "be treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415 (1920). At the same time, both common experience and the unhappy history reflected in our cases, see *Cabell* v. *Chavez-Salido,* 454 U. S. 432, 462–463 (1982) (dissenting opinion); *Ambach* v. *Norwick,* 441 U. S., at 82 (dissenting opinion), demonstrate that aliens often have been the victims of irrational discrimination.

In combination, these factors—disparate treatment accorded a class of "similarly circumstanced" persons who historically have been disabled by the prejudice of the majority—led the Court to conclude that alienage classifications "in themselves supply a reason to infer antipathy," *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 272 (1979), and therefore demand close judicial scrutiny. This understanding, which is at the heart of the Court's modern alienage decisions, was unreservedly reaffirmed this Term in *Cabell* v. *Chavez-Salido*, 454 U. S., at 438 ("citizenship is not a relevant ground for the distribution of economic benefits").

JUSTICE REHNQUIST nevertheless suggests that the Court's original understanding somehow has been undercut by "more recent decisions" recognizing that aliens may be excluded from the governmental process. For this proposition he cites *Cabell* v. *Chavez-Salido, supra; Ambach* v. *Norwick, supra;* and *Foley* v. *Connelie*, 435 U. S. 291 (1978). Again, with all due respect, JUSTICE REHNQUIST is simply wrong. The idea that aliens may be denied political rights is not a recently discovered concept or a newly molded principle that can be said to have eroded the prior understanding. To the contrary, the Court always has recognized that aliens may be denied use of the mechanisms of self-government, and *all* of the alienage cases have been decided against the backdrop of that principle. Indeed, this aspect of the alienage-equal protection doctrine was explored at length in *Sugarman* v. *Dougall*, 413 U. S. 634, 647–649 (1973), the second of the Court's modern decisions in the area.[2] See *Cabell* v. *Chavez-Salido*, 454 U. S., at 438–442 (citing *Sugarman*); *Ambach* v.

---

[2] Among other things, the Court noted in *Sugarman* that the State may exclude aliens from governmental positions "that go to the heart of representative government," in an attempt "'to preserve the basic conception of a political community.'" 413 U. S., at 647, quoting *Dunn* v. *Blumstein*, 405 U. S. 330, 344 (1972). The *Sugarman* Court thus recognized the "State's historical power to exclude aliens from participation in its democratic political institutions." 413 U. S., at 648. This makes JUSTICE REHNQUIST's analysis particularly perplexing; his discussion appears to suggest that *Sugarman*—decided in 1973—somehow undercut the analysis of *Hampton* v. *Mow Sun Wong*, 426 U. S. 88 (1976). See *post*, at 40.

Norwick, 441 U. S., at 74 (citing *Sugarman*); *Foley* v. *Connelie*, 435 U. S., at 294–296 (citing *Sugarman*). Yet in cases contemporary with or postdating *Sugarman* the Court has experienced no noticeable discomfort in applying strict scrutiny to alienage classifications that did not involve political interests. See *In re Griffiths*, 413 U. S. 717 (1973); *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976); *Nyquist* v. *Mauclet*, 432 U. S. 1 (1977).

It is not surprising, then, that none of the "more recent decisions" relied on by JUSTICE REHNQUIST so much as suggested that the Court's earlier analysis had been undercut. Instead, those cases pointedly have *declined* to "retrea[t] from the position that restrictions on lawfully resident aliens that primarily affect economic interests are subject to heightened judicial scrutiny." *Cabell* v. *Chavez-Salido*, 454 U. S., at 439. See *Ambach* v. *Norwick*, 441 U. S., at 75 (that aliens may be denied political rights "is an exception to the general standard applicable to classifications based on alienage"); *Foley* v. *Connelie*, 435 U. S., at 296. This reflects the Court's proper judgment that the alienage cases are not irreconcilable or inconsistent with one another. For while the Court has recognized, as the Constitution suggests, that alienage may be taken into account when it is relevant—that is, when classifications bearing on political interests are involved—"[t]he distinction between citizens and aliens . . . ordinarily [is] *irrelevant* to private activity," *Ambach* v. *Norwick*, 441 U. S., at 75 (emphasis added). And it hardly need be demonstrated that governmental distinctions based on irrelevant characteristics cannot stand. If this dual aspect of alienage doctrine is unique, it is because aliens constitute a unique class.[3]

---

[3] JUSTICE REHNQUIST suggests that alienage classifications involving political interests are subjected to a lesser standard of review because "the strength of the State's interest is great when it seeks to exclude aliens from its political processes." *Post*, at 41, n. 12. This suggestion is inaccurate. Such classifications are permissible because the Court has rec-

Finally, even were I to accept JUSTICE REHNQUIST's view that powerlessness is the end-all of alienage-equal protection doctrine, I would find preposterous his further suggestion that, because States do not violate the Constitution when they exclude aliens from participation in the government of the community, the alien's powerlessness therefore is constitutionally irrelevant. From the moment the Court began constructing modern equal protection doctrine in *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938), it never has been suggested that the *reason* for a discrete class' political powerlessness is significant; instead, the *fact* of powerlessness is crucial, for in combination with prejudice it is the minority group's inability to assert its political interests that "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.*, at 152–153, n. 4. The very powerlessness of a discrete minority, then, is itself the factor that overcomes the usual presumption that "'even improvident decisions [affecting minorities] will eventually be rectified by the democratic process.'" *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 272, quoting *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979). If anything, the fact that aliens constitutionally may be—and generally are—formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage. I might add that the Court explicitly has endorsed this seemingly self-evident proposition: in *Hampton* v. *Mow Sun Wong*, 426 U. S. 88 (1976), after noting that "[s]ome of [an alien's] disadvantages stem directly from the Constitution itself," the Court declared that "[t]he legitimacy of the delineation of the affected class [of aliens] buttresses the conclusion that it is 'a "discrete and insular" minority' . . . and, of course, is consistent with the premise that the class is one whose members suffer spe-

---

ognized that they are likely to be based on meaningful distinctions: alienage "is a relevant ground for determining membership in the political community." *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 438 (1982).

cial disabilities." *Id.*, at 102, n. 22. I find JUSTICE REHNQUIST's attempt to stand this principle on its head perplexing, to say the least.

One of the few assertions that can be made with complete confidence about the Court's alienage-equal protection decisions is that no opinion for the Court has ever so much as suggested that JUSTICE REHNQUIST's lone dissent in *Sugarman*, 413 U. S., at 649—which espoused a view similar to the one he hints at today—expressed the proper approach for deciding these cases. Of course, one cannot condemn another for sticking to his guns. Barring a radical change in the Court's reasoning in cases concerning alienage, however, one can expect that today's equal protection writing by JUSTICE REHNQUIST will join his opinion in *Sugarman*, to use his phrase, as "lifeless words on the pages of these Reports." *Post*, at 48.

JUSTICE O'CONNOR, concurring in part and dissenting in part.

I concur in the Court's opinion insofar as it holds that the State may not charge out-of-state tuition to nonimmigrant aliens who, under federal law, are exempt from both state and federal taxes, and who are domiciled in the State. Imposition of out-of-state tuition on such aliens conflicts with federal law exempting them from state taxes, since, after all, the University admits that it seeks to charge the higher tuition in order to recover costs that state income taxes normally would cover.

I cannot join the remainder of the Court's opinion, however, for it wholly fails to address the criticisms leveled in JUSTICE REHNQUIST's dissenting opinion. As JUSTICE REHNQUIST makes clear, the class of G–4 aliens is not homogenous: some G–4 aliens are exempt under federal law from state taxes, while other G–4 aliens are not. Moreover, the legislative history of § 4(b) of the International Organizations Immunities Act, later reenacted as § 893 of the Internal Revenue Code of 1954, 26 U. S. C. § 893, from which many G–4 aliens derive their federal tax immunity, demonstrates that Congress did not intend to exempt such aliens from state taxes, choosing instead to leave the matter to the state and local authorities. Thus, I disagree with the Court when it states that the "State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the State from collecting," *ante*, at 16, for in fact Congress has not barred the State from collecting state taxes from many G-4 aliens. Accordingly, I conclude that the Supremacy Clause does not prohibit the University from charging out-of-state tuition to those G-4 aliens who are exempted by federal law from federal taxes only.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

Despite rather broad dicta regarding the conditions under which federal power over immigration will pre-empt state statutes that adversely affect aliens, the Court's holding is narrow. Purporting to rely on a collection of treaties and statutes that concern the *tax* liability of certain nonimmigrant aliens, it concludes that no room is left for the State of Maryland to charge such aliens nonresident *tuition* for attending the State's university. The Court's dicta seems to me inconsistent with our prior cases, and its conclusion about the effect of the statutes and treaties is strained at best. In short, the Court reaches a result that I find quite out of step with our normal approach to federal pre-emption of state law.

Its holding has the additional vice of foreclosing governmental autonomy in an area plainly within the State's traditional responsibilities—education. And it acts, not on behalf of a disadvantaged minority, but at the behest of a group of individuals who have been accorded a status by the Federal Government *superior* to that of the average citizen, and in a case where the State has demonstrated, by virtue of its favorable treatment of resident aliens, that its policy is not the result of an invidious or irrational motive. I find the Court's actions unjustified and unnecessary and, accordingly, I dissent. Because I would reverse the judgment of the Court of Appeals, I also address other grounds relied on by the lower courts and argued by respondents in support of their judgments.

I

Our prior decisions indicate that "when a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 157 (1978). State laws will survive such a challenge unless there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 141 (1963).

Unquestionably, federal power over immigration and naturalization is plenary and exclusive. Our decision in *De Canas* v. *Bica*, 424 U. S. 351 (1976), however, unambiguously forecloses any argument that this power, either unexercised or as manifested in the Immigration and Nationality Act, preempts the field of regulations affecting aliens once federal authorities have admitted them into this country. In light of the Court's expansive observations in the instant case, that opinion bears quoting at some length:

> "[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by [the Federal Government's] constitutional power, whether latent or exercised. For example, *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410, 415–422 (1948), and *Graham* v. *Richardson*, 403 U. S. 365, 372–373 (1971), cited a line of

> cases that upheld certain discriminatory state treatment of aliens lawfully within the United States. Although the 'doctrinal foundations' of the cited cases, which generally arose under the Equal Protection Clause 'were undermined in *Takahashi*,' they remain authority that, standing alone, the fact that aliens are the subject of a state statute *does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.*" *Id.*, at 355 (citations omitted; emphasis added).

In *De Canas* the Court also held that Congress' enactment of the Immigration and Nationality Act (INA) was insufficient to oust "harmonious state regulation touching on aliens in general." *Id.*, at 358.

Thus, neither Congress' unexercised constitutional power over immigration and naturalization, nor its exercise of that power in passing the INA, precludes the States from enforcing laws and regulations that prove burdensome to aliens. Under our precedents, therefore, state law is invalid only if there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, *supra*, at 141,[1] or if Congress has in some other way unambiguously declared its intention to foreclose the state law in question, see *Ray* v. *Atlantic Richfield Co.*, *supra*, at 157–158. In the absence of a conflict, "we are not to conclude that Congress legislated the ouster of [a state law] in the absence of an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers*, *supra*, at 146–147.

---

[1] The state courts in *De Canas* v. *Bica*, 424 U. S. 351 (1976), had not addressed the question in light of their determination that Congress had completely barred state action in the field of employment of illegal aliens. Consequently, this Court also deferred consideration of the issue. *Id.*, at 363.

Notwithstanding these settled principles, the Court suggests in dicta that any state law which discriminates against lawfully admitted aliens is void, presumably without regard to the strength of the State's justification, if Congress did not contemplate such a law. *Ante*, at 12–13. This standard seems to me clearly to reverse the presumption that normally prevails when state laws are challenged under the Supremacy Clause. The Court relies on language in three cases to support this proposition. On closer inspection, none of the three offers the precedential support for which the Court obviously grasps.

The first case, *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410 (1948), involved a California statute that prohibited the issuance of commercial fishing licenses to aliens who were ineligible for citizenship. The language emphasized by the Court explains that "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Id.*, at 419 (footnote omitted). In the *Takahashi* opinion, this statement is immediately followed by three citations, which the Court omits. These citations explain, and qualify, the otherwise broad language quoted by the Court. In the first of these cases, *Chy Lung* v. *Freeman*, 92 U. S. 275 (1876), the Court considered a California law that, with certain extremely limited exceptions, prohibited any alien who was, or would likely become, "a public charge," from entering the State through any of its ports. The Court held that the statute was pre-empted by federal law: "The passage of laws which concern the *admission* of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States." *Id.*, at 280 (emphasis added).

The second case cited in *Takahashi*, *Truax* v. *Raich*, 239 U. S. 33 (1915), concerned an Arizona statute limiting virtually all employment opportunities in the State to citizens. Although *Truax* involved an asserted repugnancy to the

Equal Protection Clause, the Court also suggested that the challenged statute was in conflict with federal law. It is important to note that the Court interpreted the statute as "deny[ing] to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." *Id.*, at 41. The Court subsequently stated: "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them *entrance and abode*, for in ordinary cases they cannot live where they cannot work." *Id.*, at 42 (emphasis added).

The final case relied on in *Takahashi* is *Hines* v. *Davidowitz*, 312 U. S. 52 (1941). The Pennsylvania statute at issue there required adult aliens to register with the State and to carry an identification card, which they were required to present on demand to state agents. The Court held that the statute was pre-empted by the federal Alien Registration Act of 1940, finding that "[t]he basic subject of the state and federal laws [was] identical," *id.*, at 61, and that the state law embodied requirements that Congress had studiously avoided in passing the federal Act, *id.*, at 70–74.

Thus, in each of these cases, the Court found either a clear encroachment on exclusive federal power to admit aliens into the country or a clear conflict with a specific congressional purpose. It was with these cases in mind that the Court in *Takahashi* condemned "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States." 334 U. S., at 419. It is most unlikely, therefore, that the Court intended with one stroke of the pen to reverse the normal presumption applicable in cases challenging state enactments under the Supremacy Clause, and to declare such laws invalid without regard to the existence of a conflict with federal statutes or a usurpation of federal power over immigration.

The Court also relies on *Graham* v. *Richardson*, 403 U. S. 365 (1971), which struck down as a denial of equal protection a California law that withheld welfare benefits from lawfully resident aliens. As an alternative ground, the Court also declared the law invalid as an encroachment on federal power. On the basis of specific federal statutes barring the admission of aliens likely to become public charges, and providing for the deportation of aliens who become public charges because of factors that existed prior to entry, the Court inferred a congressional purpose not "to impose any burden or restriction on aliens who become indigent after their entry into the United States." *Id.*, at 377. The Court also concluded, relying on *Truax*, *supra*, that the law denied indigent aliens the "necessities of life," and therefore "equate[d] with the assertion of a right, inconsistent with federal policy, to deny entrance and abode." The holding in *Graham*, therefore, offers no support for a presumption that *all* state laws burdening aliens conflict with amorphous federal power over immigration.

Finally, the Court quotes from dictum appearing in a footnote in *De Canas* v. *Bica*, 424 U. S., at 358, n. 6, that "'state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.'" *Ante*, at 12–13. The principal support for this assertion was the passage previously quoted by the Court from *Takahashi*. As I have already indicated, that passage in context means a good deal less than it does out of context. Most important, however, *De Canas* itself suggests that the quoted footnote is not a fair description of the law. Although the statute at issue only affected illegal aliens, the principles recognized in the Court's opinion were not so limited. Thus, the Court emphasized that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration," 424 U. S., at 355, that *Takahashi*, *Graham*, and *Hines* found pre-emption only after examining specific congressional enactments, 424 U. S., at 355, that it was necessary to look for some "specific indication . . . that Congress intended to preclude even harmonious state regulation touching on aliens in general," *id.*, at 358, and that pre-emption should be found only when it is possible to say "'either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained,'" *id.*, at 356 (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S., at 142).

In sum, the fact that a state statute can be said to discriminate against aliens does not, standing alone, demonstrate that the statute is pre-empted, absent some form of congressional sanction. The statute in *De Canas* discriminated against aliens, yet the Court found no strong evidence that Congress intended to pre-empt it. Obviously, the fact that the aliens were in this country illegally was an important factor in ascertaining Congress' intent. But, just as clearly, the fact that disadvantaged aliens are *lawfully* in the country does not authorize the Court to dispense with the particularized inquiry into congressional intent that pre-emption analysis traditionally has demanded.[2] Discriminatory legislation may well be invalid under the federal civil rights laws as a denial of equal treatment, but under our precedents such a conclusion is possible only after an examination of the classification drawn by the State and its justification for doing so. Under the Court's summary of pre-emption principles applicable to laws discriminating against aliens, these factors would be irrelevant.[3] I cannot agree that such a summary accurately reflects the law.

---

[2] As the Court obligatorily notes, *ante*, at 12, n. 17, but promptly ignores, our decisions in *Foley* v. *Connelie*, 435 U. S. 291 (1978); *Ambach* v. *Norwick*, 441 U. S. 68 (1979); and *Cabell* v. *Chavez-Salido*, 454 U. S. 432 (1982), all upheld state laws that expressly discriminated against lawfully admitted resident aliens. Such decisions would not have been possible if the mere fact that a law discriminated against aliens placed it in irreconcilable conflict with federal power over immigration.

[3] As I have always understood the Supremacy Clause, if a state law is inconsistent with federal law, the state law is unenforceable. The inconsistency is made no less fatal because the State has a rational basis for, or a compelling interest in, its actions. Under the majority's formulation, a state law that arguably discriminates against aliens conflicts with federal

The Court concedes that the proper application of its pre-emption principle "is likely to be a matter of some dispute," *ante*, at 13, and then proceeds to resolve the case by finding a conflict between Maryland's tuition policy and a collection of treaties and statutes that address the tax liability of certain nonimmigrant aliens. Although I find this conclusion quite unconvincing, it is gratifying to learn that in practice perhaps the Court's new principle still demands proof of a conflict with federal law, just as traditional pre-emption cases instruct. Because the Court's judgment relies on the asserted presence of such a conflict, its statements suggesting that such a particularized inquiry is unnecessary must be regarded as dicta, though unwise dicta at that. With this said, I turn to the Court's discovery of a conflict with federal law.

II

The Court relies on two features of federal law. First, it notes that Congress has permitted nonimmigrant aliens holding G-4 visas to establish domicile in the United States. *Ante*, at 14. It then reasons that denying these aliens in-state tuition conflicts with Congress' decision. The Court offers no evidence that Congress' intent in permitting respondents to establish "domicile in the United States" has any bearing at all on the tuition available to them at state universities. Federal law does not require the States to make residence or domicile the determinant of their tuition policies, and as the Court recognizes, Maryland has chosen not to do so in the case of nonimmigrant aliens. Moreover, unlike the state laws scrutinized in *Truax* and *Graham*, Maryland's policy does not deprive respondents of a livelihood or the means of subsistence such that it could fairly be characterized as denying respondents "entrance and abode," 239 U. S., at 42.

---

law, and unless further modifications of the pre-emption doctrine are in the offing, that will be the end of the matter.

The Court's reference to "domicile in the United States," therefore, is little more than a restatement of its more general principle that any laws burdensome to aliens who have been lawfully admitted are presumptively pre-empted absent congressional intent to "sanction" them. As I have already suggested, this turns pre-emption analysis on its head.

The second feature of federal law on which the Court relies consists of certain statutes and treaties that affect the tax liability of G-4 visaholders. The Court considers these statutes and treaties as an amorphous whole and concludes that the University's policy "frustrates" the policies embodied in them. "The State may not recoup indirectly from respondents' parents the taxes that the Federal Government has expressly barred the State from collecting." *Ante*, at 16. There are two serious flaws in this argument. First, the Federal Government has not barred the States from collecting taxes from many, if not most, G-4 visaholders. Second, as to those G-4 nonimmigrants who *are* immune from state income taxes by treaty, Maryland's tuition policy cannot fairly be said to conflict with those treaties in a manner requiring its pre-emption.

The individual respondents in this case represent a class of G-4 visaholders or their dependents who are or may become students at the University of Maryland. The Court, contrary to the teaching of our cases,[4] reasons as though the class members were a homogenous group. They are not, and the Court's ignorance of relevant differences leads it into error. The named class representatives are dependents of employees of either the Inter-American Development Bank or the International Bank for Reconstruction and Development (the World Bank). As the Court notes, the salaries paid employees of these organizations are exempt by international agreement from taxation by any country other than their own. *Ante*, at 15. As the Court also notes, the exemption contained in the agreement establishing the World Bank has by statute been given the force of federal law in the United States. 22 U. S. C. § 286h; see *ante*, at 15–16.

---

[4] "[A] host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogenous multitude of persons with a wide-ranging variety of ties to this country." *Mathews* v. *Diaz*, 426 U. S. 67, 78–79 (1976) (footnote omitted).

Most G–4 visaholders, however, derive whatever tax immunity they enjoy in this country from § 4(b) of the International Organizations Immunities Act (IOIA or Act), later reenacted as § 893 of the Internal Revenue Code of 1954, 26 U. S. C. § 893. That statute exempts the salaries paid to alien employees of international organizations from *federal* income tax. The principal purpose of the Act as a whole, which is now divided among many Titles of the United States Code, was to extend governmental privileges and immunities to international organizations and their officers and employees located in this country. H. R. Rep. No. 1203, 79th Cong., 1st Sess., 4 (1945). As noted, § 4 amended the Internal Revenue Code to exempt the salaries of such officers and employees from federal income tax. As the relevant Committee Reports demonstrate, the exemption was strictly limited to salaries; income derived from commercial activities, investments, and other similar sources was not to enjoy an exemption, and all federal taxes other than those applicable to income remained fully effective. *Ibid.;* S. Rep. No. 861, 79th Cong., 1st Sess., 4–5 (1945).

Section 6 of the bill, as originally introduced in the House, provided an exemption from state and local taxes as well.[5]

---

[5] Section 6 of the original bill, H. R. 4489, read as follows:

"International organizations shall be exempt from all property taxes imposed by, or under the authority of, any act of Congress, including such acts as are applicable solely to the District of Columbia or the Territories; and shall be entitled to the same exemptions and immunities from State or local taxes as is the United States Government." 91 Cong. Rec. 10867 (1945).

The Senate Committee deleted the exemption, reasoning that "this matter should be properly dealt with by the State and local authorities." S. Rep. No. 861, *supra*, at 5. The House eventually agreed to the amendment, and the bill as enacted contains no exemption from state or local taxes.[6] Floor debates confirm what the Committee amendment implied: although the Act provides an exemption from the federal income tax, it was not intended to foreclose the States from taxing employees of international organizations.[7] Accordingly, employees of international organizations whose tax immunity derives solely from the IOIA can claim no federal immunity from state taxes. According to petitioners, approximately three-quarters of the international organizations whose employees hold G–4 visas fall into that category. Brief for Petitioners 29, n. 22. Therefore, even if one were to accept the Court's reasoning that immunity from state taxes implies a right to in-state college tuition, many, if not most of the class members cannot benefit from the argument.[8]

---

[6] Section 6 is codified at 22 U. S. C. § 288c and now reads:

"International organizations shall be exempt from all property taxes imposed by, or under the authority of, any Act of Congress, including such Acts as are applicable solely to the District of Columbia or the Territories."

[7] Thus, sponsors of the legislation in the House assured their colleagues that the bill would not admit such employees as immigrants. In addition, the following exchange occurred:

"Mr. RANKIN. This bill does not interfere with State laws in any way?

"Mr. ROBERTSON of Virginia. None whatever." 91 Cong. Rec. 10866 (1945).

In the Senate, Senator Taft explained that his Committee had deleted the proposed exemption contained in § 6 because it "felt that that was wholly beyond the power of Congress." 91 Cong. Rec. 12432 (1945).

[8] G–4 visaholders residing in Maryland who are relieved of federal taxes under the Internal Revenue Code have also been exempted from Maryland taxes by operation of *state* law. Maryland's tax code provides that, with certain exceptions not relevant here, the net income taxable under state law is the taxpayer's federal adjusted gross income. Md. Ann. Code, Art. 81, § 280(a) (1980). By operation of 26 U. S. C. § 893, that amount will not

The Court's reasoning is flawed, however, and cannot help even those class members whose parents' tax immunity is based on a treaty or international agreement.[9] The State's tuition policy is void under the Supremacy Clause only "to the extent that it actually conflicts with a valid federal statute," *Ray* v. *Atlantic Richfield Co.*, 435 U. S., at 158, or, of course, a valid treaty. As the Court stated in *Ray, ibid.:*

> "A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . . ,' *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941); *Jones* v. *Rath Packing Co.*, [430 U. S.], at 526, 540–541. Accord, *De Canas* v. *Bica*, 424 U. S. 351, 363 (1976)."

There is, of course, no physical impossibility in the coexistence of the two policies. The treaties and agreements insure that signatory nations will not tax the salaries of foreign

---

include wages paid by an international organization. The *State's* decision indirectly to relieve class members of state taxes on their salaries of course provides no basis for pre-emption of the State's tuition policy under the Supremacy Clause.

[9] The District Court, which concluded that the State's tuition policy interfered with Congress' exclusive control over immigration, nevertheless rejected the argument that the policy conflicted with the treaties and agreements relieving respondents of liability for income taxes.

"In this case it is apparent that there is no 'clear conflict' between the policies in question. The University's Policy seeks to confer certain economic benefits on individuals closely affiliated with the State of Maryland. The mere fact that one of the factors which is considered in determining eligibility for this benefit is whether or not the applicant's income is taxed by Maryland does not necessarily imply that the policy conflicts with the tax policies contained in the relevant international agreements. The 'conflict' between these policies, in and of itself, is too attenuated to warrant invalidating the University's Policy." 489 F. Supp. 658, 667 (Md. 1980).

nationals employed by the designated organizations. The State of Maryland does not tax these salaries. It merely charges tuition for enrollment in its University that is higher than the tuition charged to American citizens and other foreign nationals who have been admitted to this country as immigrants.

The remaining question is whether Maryland's tuition policy "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the treaties and agreements. *Hines* v. *Davidowitz,* 312 U. S., at 67. In answering this question, it is well to bear in mind certain guideposts that the Court appears to have forgotten: "It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy." *United States* v. *Pink,* 315 U. S. 203, 230 (1942). "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them." *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 143 (1938). In this case, the Court has gone out of its way to raise the banner of federal supremacy over the State's University, without support in the language of the treaties and without examining the intent of the negotiating parties.

It is one thing to exempt employees of an international organization from tax liability on their salaries, which otherwise would be incurred by the employees simply by doing what they came to this country to do—working for international organizations such as the World Bank. It is another matter to restrict the State's ability to recover its costs in providing educational services, which respondents were certainly not required to use. Cf. *Hamilton* v. *Regents of the University of California,* 293 U. S. 245, 262 (1934). Although a college education over the years has become accessible to increasing numbers of Americans, it can hardly be characterized as an unavoidable feature of life in this country.

Thus, although the negotiating parties undoubtedly intended to lower the costs of international organizations by exempting employees from income taxes, it does not at all follow that they *further* intended to require the States to subsidize the cost of services which those employees or their families might choose to use.[10]

Indeed, the United States, which unlike the State of Maryland negotiated the agreements in question, clearly does not understand them to require that education for G-4 visaholders be subsidized to the same extent as education for citizens or resident aliens. For example, the Federal Guaranteed Student Loan Program, which provides significant aid to students attending qualifying colleges and graduate schools, is available to American citizens and permanent resident aliens, but *not* to nonimmigrant aliens such as respondents. See 34 CFR § 682.201(a)(2) (1981). If this reflects the federal policy embodied in the treaties on which the Court relies, I fail to see how Maryland's tuition policy "frustrates" it.

III

The lower courts' principal basis for invalidating Maryland's tuition policy was not the Supremacy Clause, but the Equal Protection Clause. Those courts interpreted the State's policy as a classification based on alienage, and therefore subjected it to "strict scrutiny" on the authority of *Graham* v. *Richardson*, 403 U. S. 365 (1971), and later cases. In light of several recent decisions, however, it is clear that not every alienage classification is subject to strict scrutiny. In my view, the classification relied upon by the State in this case cannot fairly be called "suspect," and therefore I would ask only whether it rests upon a rational basis. Because I believe it does, I cannot agree with the lower courts that it denies the equal protection of the laws.

---

[10] As petitioners explain, tuition and fee charges do not pay the full cost of a university education at the University of Maryland. In fiscal year 1981, for example, the University received appropriations from general fund revenues in the amount of $164 million. Brief for Petitioners 29, n. 23. Nearly half of general fund revenues are provided by the State's income tax. *Ibid.* The State, therefore, subsidizes the cost of education at the University. The amount of the subsidy, of course, is considerably greater for students who are eligible for in-state tuition. Since residents of the State normally pay income tax, and thereby indirectly contribute to the subsidy, it is not unreasonable for the State to accord such persons a reduced tuition. By charging respondents out-of-state tuition, the University is merely asking them to pay their fair share of the cost of state-supported education.

The Equal Protection Clause of the Fourteenth Amendment has been interpreted by this Court as embodying the principle that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920). By the same token, however, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940).

All laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the legislators responsible for the enactment. The Equal Protection Clause, however, reflects the judgment of its Framers that some distinguishing characteristics may seldom, if ever, be the basis for difference in treatment by the legislature. The key question in all equal protection cases, of course, is whether the distinguishing characteristics on which the State relies are constitutional.

In the vast majority of cases our judicial function permits us to ask only whether the judgment of relevance made by the State is rational. See *McGowan* v. *Maryland*, 366 U. S. 420, 425–426 (1961).[11] In a very few other cases, we have required that the State pass a more demanding test because of the judgment that the classification drawn by the State is virtually never permissible from a constitutional perspective. Such classifications are deemed "suspect" and strictly scrutinized. Until 1971, only race and national origin had been so classified by the Court. See *Brown* v. *Board of Education*, 347 U. S. 483, 494 (1954); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); *Oyama* v. *California*, 332 U. S. 633 (1948).

---

[11] "This standard reduces to a minimum the likelihood that the federal judiciary will judge state policies in terms of the individual notions and predilections of its own members, and until recently it has been followed in all kinds of 'equal protection' cases." *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 681–682 (1966) (Harlan, J., dissenting).

In *Graham* v. *Richardson*, *supra*, the Court added alienage to this select list. Apart from the abbreviated conclusion that "[a]liens as a class are a prime example of a 'discrete and insular' minority," *id.*, at 372, the Court did not elaborate on the justification for "heightened judicial solicitude," *ibid.* Subsequently, the Court observed that aliens, unlike other members of the community, were subject to the particular disadvantage of being unable to vote, and thus were barred from participating formally in the process of self-government. *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 102 (1976). One could infer that rigorous judicial scrutiny normally was necessary because aliens were barred from asserting their interests in the governmental body responsible for imposing burdens upon them.

More recent decisions have established, however, that the political powerlessness of aliens is itself the consequence of distinctions on the basis of alienage that are constitutionally permissible.

> "[I]t is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. See [*Sugarman* v. *Dougall*, 413 U. S. 634, 647–649 (1973)]. Similar considerations support a legislative determination to exclude aliens from jury service. See *Perkins* v. *Smith*, 370 F. Supp. 134 (Md. 1974), aff'd, 426 U. S. 913 (1976). Likewise, we have recognized that citizenship may be a relevant qualification for fulfilling those 'important nonelective executive, legislative, and judicial positions,' held by 'officers who participate directly in the formu-

> lation, execution, or review of broad public policy.' *Dougall, supra,* at 647." *Foley* v. *Connelie,* 435 U. S. 291, 296 (1978).

As the Court explained earlier this Term:

> "The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community. Judicial incursions into this area may interfere with those aspects of democratic self-government that are most essential to it." *Cabell* v. *Chavez-Salido,* 454 U. S. 432, 439–440 (1982).

If the exclusion of aliens from the political processes is legitimate, as it clearly is, there is reason to doubt whether political powerlessness is any longer a legitimate reason for treating aliens as a "suspect class" deserving of "heightened judicial solicitude." Indeed, in *Foley* v. *Connelie, supra, Ambach* v. *Norwick,* 441 U. S. 68 (1979), and *Cabell* v. *Chavez-Salido, supra,* the Court plainly eschewed the application of strict scrutiny to the States' exclusion of aliens from particular public offices.[12] In my view, these decisions merely reflect the judgment that alienage, or the other side of the coin, citizenship, is for certain important state purposes a constitutionally relevant characteristic and therefore cannot always be considered invidious in the same manner as race or national origin.[13]

---

[12] As suggested earlier, we have affirmed "the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." *Ambach* v. *Norwick,* 441 U. S., at 73–74. "[I]n those areas the State's exclusion of aliens need not 'clear the high hurdle of "strict scrutiny," because [that] would "obliterate all the distinctions between citizens and aliens, and thus depreciate the historic value of citizenship."' *Foley* v. *Connelie,* 435 U. S., at 295 (citation omitted)." *Cabell* v. *Chavez-Salido,* 454 U. S., at 439 (footnote omitted). The Court has recognized that the strength of the State's interest is great when it seeks to exclude aliens from its political processes, but selection of the appropriate level of "scrutiny" traditionally

---

has depended, not on the nature of the State's interest, but on the nature of the burdened class. If the Court has eschewed strict scrutiny in the "political process" cases, it may be because the Court is becoming uncomfortable with the categorization of aliens as a suspect class.

[13] That judgment was shared by the Framers of the Fourteenth Amendment. Indeed, the first clause of the first section of that Amendment confirms the importance of citizenship by defining the means of obtaining it in a way that encompassed the freed slaves: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." Citizenship is also a concept fundamental to structures and processes established elsewhere in the Constitution:

> "The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times, see *Sugarman* v. *Dougall*, *supra*, at 651–652 (REHNQUIST, J., dissenting), indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance." *Ambach* v. *Norwick*, *supra*, at 75.

JUSTICE BLACKMUN has chosen to respond to this portion of the dissent, but misunderstands my point. I have observed that the political powerlessness of aliens is the result of state-created classifications which this Court has upheld as constitutional. One may nevertheless conclude, as JUSTICE BLACKMUN does, that the political powerlessness of aliens is still a reason for applying strict scrutiny to alienage classifications. My point, to which JUSTICE BLACKMUN's concurrence is unresponsive, is that a classification which is constitutionally relevant to many important state purposes should not be considered "suspect." It is beside the point to recognize that alienage may be irrelevant for some other purposes. Were this consideration conclusive, all state classifications would be considered "suspect" under the Equal Protection Clause because every classification is relevant to some purposes and irrelevant to others.

IV

The State's policy in this case is to provide in-state tuition to residents of the State who are citizens and immigrant aliens lawfully admitted for permanent residence. In-state tuition is not available to certain students, however, regardless of whether they have established residence within the State. Within this class are citizens who are financially dependent either on parents or on a spouse who is not domiciled in the State, as well as citizens who are members of the Armed Forces and have been assigned by the military to attend the University.[14] Also within the class are nonimmigrant aliens, who have not been admitted to this country for permanent residence.

---

[14] The State's written policy, effective since 1975, reads in part as follows:

"1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:

"a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

"b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester.

"c. Where a student is the spouse or a dependent child of a full-time employee of the University.

"d. Where a student who is a member of the Armed Forces of the United States is stationed on active duty in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester, unless such student has been assigned for educational purposes to attend the University of Maryland.

"e. Where a student is a full-time employee of the University of Maryland.

"2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge-differential purposes in all other cases." App. to Pet. for Cert. 167a–168a.

In each case in which the Court has tested state alienage classifications under the Equal Protection Clause, the question has been the extent to which the States could permissibly distinguish between citizens and permanent resident aliens. See *Graham* v. *Richardson*, 403 U. S. 365 (1971); *Sugarman* v. *Dougall*, 413 U. S. 634 (1973); *In re Griffiths*, 413 U. S. 717 (1973); *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976); *Nyquist* v. *Mauclet*, 432 U. S. 1 (1977). We recently summarized these decisions as implying that "there would be few—if any—areas in which a State could legitimately distinguish between its citizens and *lawfully resident aliens*." *Cabell* v. *Chavez-Salido*, 454 U. S., at 438 (emphasis added). In this case, however, the question is whether the State can distinguish between two groups, each of which consists of citizens and aliens. For two reasons, the State's classification should not be deemed "suspect" and subjected to strict scrutiny.

First, unlike immigrant aliens, nonimmigrants such as G-4 visaholders are significantly different from citizens in certain important respects. Our previous decisions have emphasized that immigrant aliens have been lawfully admitted to this country for permanent residence and share many of the normal burdens of citizenship, such as the duty to pay taxes and to serve in the Armed Forces. *Nyquist* v. *Mauclet*, *supra*, at 12; *Hampton* v. *Mow Sun Wong*, 426 U. S., at 107, n. 30; *Sugarman* v. *Dougall*, *supra*, at 645; *Graham* v. *Richardson*, *supra*, at 376. Implicit in these cases is the judgment that because permanent resident aliens are in so many respects situated similarly to citizens, distinctions between them are to be carefully scrutinized.[15] Although there is legitimate doubt whether these decisions have survived *Foley, Ambach,* and *Cabell* intact, their judgment about the need for strict scrutiny simply does not apply to state policies that distinguish between permanent resident aliens and nonimmigrants.

---

[15] For example, in *Nyquist*, the Court stated:

"Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. There thus is no real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis." 432 U. S., at 12.

As noted earlier, nonimmigrant aliens holding G-4 visas, unlike resident aliens, are exempt from Maryland's income tax, by operation of either international agreement or a combination of federal and state law.[16] The University is substantially supported by general state revenues appropriated by the legislature, and of this sum nearly half is generated by the state income tax. See Brief for Petitioners 29, n. 23. Consequently, for the purpose of assessing tuition to the State's University, G-4 nonimmigrant aliens are not situated similarly either to most citizens or to permanent resident aliens. They are distinguished by a trait that is obviously quite relevant from the State's perspective, and legitimately so. Other nonimmigrant aliens are subject to state income taxes, but, as respondents concede, Brief for Respondents 12, 14, 23, they are admitted to this country only temporarily and for limited purposes. These aliens are also not situated similarly to resident citizens or to permanent resident aliens because most are admitted on the condition that they cannot establish domicile in the United States. See *Elkins* v. *Moreno*, 435 U. S. 647, 665 (1978). As a group, then, nonimmigrant aliens are sufficiently different from citizens in relevant respects that distinctions between them and citizens or immigrant aliens should not call for heightened scrutiny.

Second, the State's tuition policy, as it applies to G-4 visaholders, simply cannot be broadly characterized as a classification that discriminates on the basis of alienage. It is more accurately described as a policy that classifies on the basis of financial contribution toward the costs of operating the University. In one class are citizens and permanent resident aliens, all of whom have lived in the State and have contributed to state revenues through the payment of income taxes. To these students the State offers its in-state tuition, which covers only a portion of the cost of educating each student. The remainder is subsidized through state revenues, to which the students themselves have contributed by paying the full spectrum of state taxes.

---

[16] In addition, nonimmigrant aliens are not required to register for military service. See 50 U. S. C. App. § 453(a) (1976 ed., Supp. V); 32 CFR § 1611.2 (1980).

In the other class is an equally mixed group of citizens and aliens. Some of these citizens do not reside in the State and therefore do not pay state taxes. Others do reside in the State, but are financially dependent on parents or a spouse who is domiciled elsewhere and therefore do not help finance the operation of the University through income taxes. Nonimmigrant aliens holding G–4 visas also reside in the State but, like citizens in this class, do not pay state income taxes.[17] To all members of this class the State charges a higher, so-called "out-of-state" tuition, although one that still does not fully cover the cost of education. Just as it may seem unfair for a State to deny to a resident alien the right to participate in public benefits to which he has contributed through taxes, it might seem equally unfair to allow G–4 visaholders to participate, on a par with taxpaying resident citizens and permanent resident aliens, in public benefits to which they have *not* contributed. Whether or not such a judgment is correct, a policy justified in such terms cannot fairly be called the product of xenophobic prejudice. Given the State's decision to treat immigrant aliens on a par with citizens, its decision to require a higher tuition of G–4 nonimmigrant aliens cannot be characterized as a classification on the basis of alienage.[18]

---

[17] Other nonresident aliens whose tax liability is not the subject of a treaty or special law such as the IOIA are subject to taxation only on income received from sources within the United States at a maximum rate of 30%. 26 U. S. C. § 871(a)(1).

Consequently, for either of these reasons, the "strict scrutiny" authorized by *Graham* v. *Richardson*, 403 U. S. 365 (1971), even if it is still applicable to discrimination against permanent resident aliens, has no proper application to the State's policy in this case. The only question, therefore, is whether "the State's classification rationally furthers the purpose identified by the State." *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 314 (1976). The State has articulated several purposes for its policy of denying in-state tuition to nonimmigrant aliens. One purpose is roughly to equalize the cost of higher education borne by those students who do and those who do not financially contribute to the University through income tax payments. The purpose surely is a legitimate one, and I should think it evident that the State's classification rationally furthers that purpose.[19]

---

[18] Respondents, citing *Nyquist* v. *Mauclet*, 432 U. S., at 9, argue that strict scrutiny applies even when the State discriminates only against a certain subclass of aliens rather than all aliens. In *Nyquist*, the State argued that its law limiting financial assistance for higher education to citizens and resident aliens who declared their intention to seek citizenship was not a classification on the basis of alienage. Rather, it distinguished between aliens who intended to become citizens and those who did not. The Court rejected this argument, noting that the statute was "directed at aliens and that only aliens [were] harmed by it." *Ibid.* In this case, however, the State also denies in-state tuition to certain resident citizens, as well as to G–4 visaholders. Moreover, even if the State denied in-state tuition to G–4 visaholders alone, strict scrutiny would not be called for. As argued in the text, G–4 visaholders and other nonimmigrant aliens, unlike permanent resident aliens who were the subject of discrimination in *Nyquist*, are not so similarly situated to citizens as to render distinctions between such aliens and citizens "suspect."

[19] As respondents note, G–4 visaholders do pay state taxes other than the income tax. State and local property taxes, however, do not enter the general funds of the State and thus do not support the operation of the University. Brief for Petitioners 29, n. 23. In any event, "a State does not

V

On June 23, 1978, approximately two months after our decision in *Elkins* v. *Moreno*, 435 U. S. 647 (1978), the University's Board of Regents adopted a "clarifying" resolution establishing beyond doubt that the State's policy excluding G-4 visaholders from eligibility for in-state tuition was not based on their lack of domicile. For this reason, we remanded the case to the District Court for further proceedings, having concluded that this case was no longer controlled by *Vlandis* v. *Kline*, 412 U. S. 441 (1973), as limited by *Weinberger* v. *Salfi*, 422 U. S. 749, 771 (1975). *Toll* v. *Moreno*, 441 U. S. 458, 461-462 (1979). On remand, the District Court concluded that although the clarifying resolution adopted on June 23, 1978, eliminated the "conclusive presumption" that respondents could not establish domicile, the existence of such a presumption before that date denied respondents due process under the teaching of *Vlandis* v. *Kline*, *supra*.

There is legitimate doubt whether at this late date anything remains of *Vlandis* v. *Kline* but its lifeless words on the pages of these Reports. Such doubts, however, need not be resolved in this case. The University has made clear that domicile is not the principal consideration underlying its tuition policy as applied to respondents, and in my view that policy is rationally related to other legitimate purposes proffered by the State. The classification challenged by respondents did not change on June 23, 1978. If the classification is valid today, as I believe it is, then it was valid before the State issued its "clarifying" resolution. A statute's con-

---

violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970). Respondents' exemption from the income tax sufficiently distinguishes them from citizens and other aliens who do pay such taxes, and therefore contribute a greater portion of their incomes to support the University, that the State's decision to require higher tuition payments is certainly rational.

sistency with the Due Process Clause or the Equal Protection Clause should not depend on which purpose state officials choose to emphasize at a particular time, as long as one of the State's purposes is rationally served by the statute. See *McGowan* v. *Maryland*, 366 U. S., at 426 ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it").

For the foregoing reasons, I would reverse the judgment of the Court of Appeals.

NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 81–150. Argued April 27, 1982—Decided June 28, 1982*

The Bankruptcy Act of 1978 (Act) established a United States bankruptcy court in each judicial district as an adjunct to the district court for such district. The bankruptcy court judges are appointed for 14-year terms, subject to removal by the judicial council of the circuit in which they serve on grounds of incompetence, misconduct, neglect of duty, or disability. Their salaries are set by statute and are subject to adjustment. The Act grants the bankruptcy courts jurisdiction over "all civil proceedings arising under title 11 [bankruptcy] [of the United States Code] or arising in or related to cases under title 11." See 28 U. S. C. § 1471(b) (1976 ed., Supp. IV). After it had filed a petition for reorganization in a Bankruptcy Court, appellant Northern Pipeline Construction Co. (Northern) filed in that court a suit against appellee Marathon Pipe Line Co. (Marathon) seeking damages for an alleged breach of contract and warranty, as well as for misrepresentation, coercion, and duress. Marathon sought dismissal of the suit on the ground that the Act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution. The Bankruptcy Court denied the motion to dismiss, but on appeal the District Court granted the motion.

Held: The judgment is affirmed.

12 B. R. 946, affirmed.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded that:

1. Section 1471's broad grant of jurisdiction to bankruptcy judges violates Art. III. Pp. 57–87.

(a) The judicial power of the United States must be exercised by judges who have the attributes of life tenure and protection against salary diminution specified by Art. III. These attributes were incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches. There is

---

*Together with No. 81–546, *United States* v. *Marathon Pipe Line Co. et al.*, also on appeal from the same court.

no doubt that bankruptcy judges created by the Act are not Art. III judges. Pp. 57–62.

(b) Article III bars Congress from establishing under its Art. I powers legislative courts to exercise jurisdiction over all matters arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations—non-Art. III courts of the Territories or of the District of Columbia, courts-martial, and resolution of "public rights" issues—in which the principle of independent adjudication commanded by Art. III does not apply. The bankruptcy courts do not lie exclusively outside the States, like the courts of the Territories or of the District of Columbia, or bear any resemblance to courts-martial, nor can the substantive legal rights at issue in the present action—the right to recover contract damages to augment Northern's estate—be deemed "public rights." There is no persuasive reason in logic, history, or the Constitution, why bankruptcy courts lie beyond the reach of Art. III. Pp. 63–76.

(c) Section 1471 impermissibly removed most, if not all, of the essential attributes of the judicial power from the Art. III district court and vested those attributes in a non-Art. III adjunct. *Crowell* v. *Benson*, 285 U. S. 22, and *United States* v. *Raddatz*, 447 U. S. 667, distinguished. Congress does not have the same power to create adjuncts to adjudicate constitutionally recognized rights and state-created rights as it does to adjudicate rights that it creates. The grant of jurisdiction to bankruptcy courts cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts. Pp. 76–87.

2. The above holding that the broad grant of jurisdiction in § 1471 is unconstitutional shall not apply retroactively but only prospectively. Such grant of jurisdiction presents an unprecedented question of interpretation of Art. III, and retroactive application would not further the operation of the holding but would visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. Pp. 87–88.

JUSTICE REHNQUIST, joined by JUSTICE O'CONNOR, concluded that where appellee Marathon Pipe Line Co. has simply been named defendant in appellant Northern Pipeline Construction Co.'s suit on a contract claim arising under state law, the constitutionality of the Bankruptcy Court's exercise of jurisdiction over that kind of suit is all that need be decided in this case; that resolution of any objections Marathon might make to the exercise of authority conferred on bankruptcy courts by the Bankruptcy Act of 1978, on the ground that the suit must be decided by an Art. III court, should await the exercise of such authority; that so much of that Act as enables a Bankruptcy Court to entertain and decide

Northern's suit over Marathon's objection violates Art. III; and that the Court's judgment should not be applied retroactively. Pp. 89–92.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 89. BURGER, C. J., filed a dissenting opinion, *post*, p. 92. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined, *post*, p. 92.

John L. Devney argued the cause for appellant in No. 81–150. With him on the briefs was *Jeffrey F. Shaw*. *Solicitor General Lee* argued the cause for the United States in both cases. With him on the briefs were *Assistant Attorney General McGrath*, *Deputy Solicitor General Shapiro*, *Alan I. Horowitz*, *William Kanter*, and *Michael F. Hertz*.

Melvin I. Orenstein argued the cause for appellee Marathon Pipe Line Co. With him on the brief were *Charles S. Cassis*, *John E. Compson*, and *Kenneth J. Orlowski*.†

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS joined.

The question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U. S. C. § 1471 (1976 ed., Supp. IV) by § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution.

I

A

In 1978, after almost 10 years of study and investigation, Congress enacted a comprehensive revision of the bankruptcy laws. The Bankruptcy Act of 1978 (Act)[1] made significant changes in both the substantive and procedural law of bankruptcy. It is the changes in the latter that are at issue in this case.

---

†Briefs of *amici curiae* urging reversal were filed by *Louis W. Levit* for the Commercial Law League of America; and by *Helen Davis Chaitman*, *Joel B. Zweibel*, *Theodore Gewertz*, and *Peter Buscemi* for the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York.

Abe Fortas, *Henry F. Field*, *Phil C. Neal*, and *Joseph M. Berl* filed a brief for Beneficial Corp. as *amicus curiae*.

Before the Act, federal district courts served as bankruptcy courts and employed a "referee" system. Bankruptcy proceedings were generally conducted before referees,[2] except in those instances in which the district court elected to withdraw a case from a referee. See Bkrtcy. Rule 102. The referee's final order was appealable to the district court. Bkrtcy. Rule 801. The bankruptcy courts were vested with "summary jurisdiction"—that is, with jurisdiction over controversies involving property in the actual or constructive possession of the court. And, with consent, the bankruptcy court also had jurisdiction over some "plenary" matters—such as disputes involving property in the possession of a third person.

The Act eliminates the referee system and establishes "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." 28 U. S. C. § 151(a) (1976 ed., Supp. IV). The judges of these courts are appointed to office for 14-year terms by the President, with the advice and consent of the Senate. §§ 152, 153(a) (1976 ed., Supp IV). They are subject to removal by the "judicial council of the circuit" on account of "incompetency, misconduct, neglect of duty or physical or mental disability." § 153(b) (1976 ed., Supp. IV). In addition, the salaries of the bankruptcy judges are set by statute and are subject to adjustment under the Federal Salary Act, 2 U. S. C. §§ 351–361 (1976 ed. and Supp. IV). 28 U. S. C. § 154 (1976 ed., Supp. IV).

---

[1] Pub. L. 95–598, 92 Stat. 2549. The Act became effective October 1, 1979.

[2] Bankruptcy referees were redesignated as "judges" in 1973. Bkrtcy. Rule 901(7). For purposes of clarity, however, we refer to all judges under the old Act as "referees."

The jurisdiction of the bankruptcy courts created by the Act is much broader than that exercised under the former referee system. Eliminating the distinction between "summary" and "plenary" jurisdiction, the Act grants the new courts jurisdiction over all "civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11." 28 U. S. C. § 1471(b) (1976 ed., Supp. IV) (emphasis added).[3] This jurisdictional grant empowers bankruptcy courts to entertain a wide variety of cases involving claims that may affect the property of the estate once a petition has been filed under Title 11. Included within the bankruptcy courts' jurisdiction are suits to recover accounts, controversies involving exempt property, actions to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy. The bankruptcy courts can hear claims based on state law as well as those based on federal law. See 1 W. Collier, Bankruptcy ¶ 3.01, pp. 3–47 to 3–48 (15th ed. 1982).[4]

---

[3] Although the Act initially vests this jurisdiction in district courts, 28 U. S. C. § 1471(a) (1976 ed., Supp. IV), it subsequently provides that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise *all* of the jurisdiction conferred by this section on the district courts," § 1471(c) (1976 ed., Supp. IV) (emphasis added). Thus the ultimate repository of the Act's broad jurisdictional grant is the bankruptcy courts. See 1 W. Collier, Bankruptcy ¶ 3.01, pp. 3–37, 3–44 to 3–49 (15th ed. 1982).

[4] With respect to both personal jurisdiction and venue, the scope of the Act is also expansive. Although the Act does not in terms indicate the extent to which bankruptcy judges may exercise personal jurisdiction, it has been construed to allow the constitutional maximum. See, *e. g.*, *In re Whippany Paper Board Co.*, 15 B. R. 312, 314–315 (Bkrtcy. NJ 1981). With two exceptions not relevant here, the venue of "a proceeding arising in or related to a case under title 11 [is] in the bankruptcy court in which such case is pending." 28 U. S. C. § 1473(a) (1976 ed., Supp. IV). Furthermore, the Act permits parties to remove many kinds of actions to the bankruptcy court. Parties "may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or

The judges of the bankruptcy courts are vested with all of the "powers of a court of equity, law, and admiralty," except that they "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U. S. C. § 1481 (1976 ed., Supp. IV). In addition to this broad grant of power, Congress has allowed bankruptcy judges the power to hold jury trials, § 1480; to issue declaratory judgments, § 2201; to issue writs of habeas corpus under certain circumstances, § 2256; to issue all writs necessary in aid of the bankruptcy court's expanded jurisdiction, § 451 (1976 ed. and Supp. IV); see 28 U. S. C. § 1651; and to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of Title 11, 11 U. S. C. § 105(a) (1976 ed., Supp. IV).

The Act also establishes a special procedure for appeals from orders of bankruptcy courts. The circuit council is empowered to direct the chief judge of the circuit to designate panels of three bankruptcy judges to hear appeals. 28 U. S. C. § 160 (1976 ed., Supp. IV). These panels have jurisdiction of all appeals from final judgments, orders, and decrees of bankruptcy courts, and, with leave of the panel, of interlocutory appeals. § 1482. If no such appeals panel is designated, the district court is empowered to exercise appellate jurisdiction. § 1334. The court of appeals is given jurisdiction over appeals from the appellate panels or from the district court. § 1293. If the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of a bankruptcy court. § 1293(b).[5]

---

a civil action by a Government unit to enforce such governmental unit's police or regulatory power." § 1478(a) (1976 ed., Supp. IV). The bankruptcy court may, however, remand such actions "on any equitable ground"; the decision to remand or retain an action is unreviewable. § 1478(b).

[5] Although no particular standard of review is specified in the Act, the parties in the present cases seem to agree that the appropriate one is the

The Act provides for a transition period before the new provisions take full effect in April 1984. §§401–411, 92 Stat. 2682–2688. During the transition period, previously existing bankruptcy courts continue in existence. §404(a), 92 Stat. 2683. Incumbent bankruptcy referees, who served 6-year terms for compensation subject to adjustment by Congress, are to serve as bankruptcy judges until March 31, 1984, or until their successors take office. §404(b), 92 Stat. 2683.[6] During this period they are empowered to exercise essentially all of the jurisdiction and powers discussed above. See §§404, 405, 92 Stat. 2683–2685. See generally 1 Collier, *supra*, ¶¶7.04–7.05, pp. 7–23 to 7–65. The procedure for taking appeals is similar to that provided after the transition period. See §405(c)(1), 92 Stat. 2685.[7]

B

This case arises out of proceedings initiated in the United States Bankruptcy Court for the District of Minnesota after appellant Northern Pipeline Construction Co. (Northern) filed a petition for reorganization in January 1980. In March 1980 Northern, pursuant to the Act, filed in that court a suit against appellee Marathon Pipe Line Co. (Marathon). Appellant sought damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress. Marathon sought dismissal of the suit, on the ground that the Act unconstitutionally conferred Art. III ju-

---

clearly-erroneous standard, employed in old Bankruptcy Rule 810 for review of findings of fact made by a referee. See Brief for United States 41; Tr. of Oral Arg. 27. See also *In re Rivers*, 19 B. R. 438 (Bkrtcy. ED Tenn. 1982); 1 Collier, *supra* n. 3, ¶3.03, p. 3–315.

[6] Under the old Bankruptcy Act, referees could be removed by the district court for "incompetency, misconduct, or neglect of duty," 11 U. S. C. §62(b) (repealed); the same grounds for removal apply during the transition period, see §404(d), 92 Stat. 2684.

[7] It appears, however, that during the transition period an appeal of a bankruptcy judge's decision may be taken to the district court even if an appellate panel of bankruptcy judges has been established.

dicial power upon judges who lacked life tenure and protection against salary diminution. The United States intervened to defend the validity of the statute.

The Bankruptcy Judge denied the motion to dismiss. 6 B. R. 928 (1980). But on appeal the District Court entered an order granting the motion, on the ground that "the delegation of authority in 28 U. S. C. § 1471 to the Bankruptcy Judges to try cases which are otherwise relegated under the Constitution to Article III judges" was unconstitutional. Both the United States and Northern filed notices of appeal in this Court.[8] We noted probable jurisdiction. 454 U. S. 1029 (1981).[9]

II

A

Basic to the constitutional structure established by the Framers was their recognition that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 300 (H. Lodge ed. 1888) (J. Madison). To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U. S. 1, 122 (1976) *(per curiam)*.

---

[8] After Northern docketed an appeal in this Court, the District Court supplemented its order with an opinion. 12 B. R. 946, 947 (1981).

[9] Two other Bankruptcy Courts have considered the constitutionality of § 1471: The Bankruptcy Court for the District of Puerto Rico determined it to be constitutional, *In re Segarra*, 14 B. R. 870 (1981), while the Bankruptcy Court for the Eastern District of Tennessee reached the opposite conclusion, *In re Rivers, supra*.

The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial. Hamilton explained the importance of an independent Judiciary:

> "Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws." The Federalist No. 78, p. 489 (H. Lodge ed. 1888).

The Court has only recently reaffirmed the significance of this feature of the Framers' design: "A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U. S. 200, 217–218 (1980).

As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. It provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. The inexorable command of this provision is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III. Those attributes are also clearly set forth:

> "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Art. III, § 1.

The "good Behaviour" Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment. *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 16 (1955). The Compensation Clause guarantees Art. III judges a fixed and irreducible compensation for their services. *United States* v. *Will*, *supra*, at 218–221. Both of these provisions were incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government.[10] As we have only recently emphasized, "[t]he Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary," 449 U. S., at 217, while the principle of life tenure can be traced back at least as far as the Act of Settlement in 1701, *id.*, at 218. To be sure, both principles were eroded during the late colonial period, but that departure did not escape notice and indignant rejection by the Revolutionary generation. Indeed, the guarantees eventually included in Art. III were clearly foreshadowed in the Declaration of Independence, "which, among the injuries and usurpations recited against the King of Great Britain, declared that he had 'made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.'" *O'Donoghue* v. *United States*, 289 U. S. 516, 531 (1933). The Framers thus recognized:

---

[10] These provisions serve other institutional values as well. The independence from political forces that they guarantee helps to promote public confidence in judicial determinations. See The Federalist No. 78 (A. Hamilton). The security that they provide to members of the Judicial Branch helps to attract well-qualified persons to the federal bench. *Ibid.* The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism. See Kaufman, Chilling Judicial Independence, 88 Yale L. J. 681, 713 (1979). See generally Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 583–585 (1980).

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" The Federalist No. 79, p. 491 (H. Lodge ed. 1888) (A. Hamilton) (emphasis in original).[11]

In sum, our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

B

It is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges. The bankruptcy judges do not serve for life subject to their continued "good Behaviour." Rather, they are appointed for

---

[11] Further evidence of the Framers' concern for assuring the independence of the Judicial Branch may be found in the fact that the Constitutional Convention soundly defeated a proposal to allow the removal of judges by the Executive and Legislative Branches. See 2 M. Farrand, Records of the Federal Convention of 1787, pp. 428–429 (1911); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 7 (2d ed. 1973). Mr. Wilson, of Pennsylvania, commented that "[t]he Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt." 2 Farrand, *supra*, at 429.

14-year terms, and can be removed by the judicial council of the circuit in which they serve on grounds of "incompetency, misconduct, neglect of duty, or physical or mental disability." Second, the salaries of the bankruptcy judges are not immune from diminution by Congress. See *supra*, at 53. In short, there is no doubt that the bankruptcy judges created by the Act are not Art. III judges.

That Congress chose to vest such broad jurisdiction in non-Art. III bankruptcy courts, after giving substantial consideration to the constitutionality of the Act, is of course reason to respect the congressional conclusion. See *Fullilove* v. *Klutznick*, 448 U. S. 448, 472–473 (1980) (opinion of BURGER, C. J.); *Palmore* v. *United States*, 411 U. S. 389, 409 (1973). See also *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 655 (1949) (Frankfurter, J., dissenting).[12] But at the same time,

---

[12] It should be noted, however, that the House of Representatives expressed substantial doubts respecting the constitutionality of the provisions eventually included in the Act. The House Judiciary Committee and its Subcommittee on Civil and Constitutional Rights gave lengthy consideration to the constitutional issues surrounding the conferral of broad powers upon the new bankruptcy courts. The Committee, the Subcommittee, and the House as a whole initially concluded that Art. III courts were constitutionally required for bankruptcy adjudications. See H. R. 8200, 95th Cong., 1st Sess. (1977); Hearings on H. R. 31 and H. R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 2081–2084 (1976); *id.*, at 2682–2706; H. R. Rep. No. 95–595, p. 39 (1977) ("Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context"); *id.*, at 21–38; Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Constitutional Bankruptcy Courts, 95th Cong., 1st Sess., 33 (Comm. Print No. 3, 1977) (concluding that the proposed bankruptcy courts should be established "under Article III, with all of the protection that the Framers intended for an independent judiciary"); Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Report on Hearings on the Court Administrative Structure for Bankruptcy Cases, 95th Cong., 2d Sess., 5 (Comm. Print No. 13, 1978) (same); see generally Klee, Legislative History of the New Bankruptcy Law, 28 De Paul L. Rev. 941, 945–949, 951 (1979). The

> "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker* v. *Carr*, 369 U. S. 186, 211 (1962).

With these principles in mind, we turn to the question presented for decision: whether the Bankruptcy Act of 1978 violates the command of Art. III that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article.

Appellants suggest two grounds for upholding the Act's conferral of broad adjudicative powers upon judges unprotected by Art. III. First, it is urged that "pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends." Brief for United States 9. Referring to our precedents upholding the validity of "legislative courts," appellants suggest that "the plenary grants of power in Article I permit Congress to establish non-Article III tribunals in 'specialized areas having particularized needs and warranting distinctive treatment,'" such as the area of bankruptcy law. *Ibid.*, quoting *Palmore* v. *United States*, *supra*, at 408. Second, appellants contend that even if the Constitution does require that this bankruptcy-related action be adjudicated in an Art. III court, the Act in fact satisfies that requirement. "Bank-

---

Senate bankruptcy bill did not provide for life tenure or a guaranteed salary, instead adopting the concept of a bankruptcy court with similarly broad powers but as an "adjunct" to an Art. III court. S. 2266, 95th Cong., 2d Sess. (1978). The bill that was finally enacted, denying bankruptcy judges the tenure and compensation protections of Art. III, was the result of a series of last-minute conferences and compromises between the managers of both Houses. See Klee, *supra*, at 952–956.

ruptcy jurisdiction was vested in the district court" of the judicial district in which the bankruptcy court is located, "and the exercise of that jurisdiction by the adjunct bankruptcy court was made subject to appeal as of right to an Article III court." Brief for United States 12. Analogizing the role of the bankruptcy court to that of a special master, appellants urge us to conclude that this "adjunct" system established by Congress satisfies the requirements of Art. III. We consider these arguments in turn.

III

Congress did not constitute the bankruptcy courts as legislative courts.[13] Appellants contend, however, that the bankruptcy courts could have been so constituted, and that as a result the "adjunct" system in fact chosen by Congress does not impermissibly encroach upon the judicial power. In advancing this argument, appellants rely upon cases in which we have identified certain matters that "congress may or may not bring within the cognizance of [Art. III courts], as it may deem proper." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856).[14] But when properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts.[15] Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. These precedents simply acknowledge that the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.

---

[13] The Act designates the bankruptcy court in each district as an "adjunct" to the district court. 28 U. S. C. § 151(a) (1976 ed., Supp. IV). Neither House of Congress concluded that the bankruptcy courts should be established as independent legislative courts. See n. 12, *supra*.

[14] At one time, this Court suggested a rigid distinction between those subjects that could be considered only in Art. III courts and those that could be considered only in legislative courts. See *Williams* v. *United States*, 289 U. S. 553 (1933). But this suggested dichotomy has not withstood analysis. See C. Wright, Law of the Federal Courts 33–35 (3d ed. 1976). Our more recent cases clearly recognize that legislative courts may be granted jurisdiction over some cases and controversies to which the Art. III judicial power might also be extended. *E. g., Palmore* v. *United States*, 411 U. S. 389 (1973). See *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 549–551 (1962) (opinion of Harlan, J.).

Appellants first rely upon a series of cases in which this Court has upheld the creation by Congress of non-Art. III "territorial courts." This exception from the general prescription of Art. III dates from the earliest days of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government. For example, in *American Ins. Co.* v. *Canter*, 1 Pet. 511 (1828), the Court observed that Art. IV bestowed upon Congress alone a complete power of government over territories not within the States that constituted the United States. The Court then acknowledged Congress' authority to create courts for those territories that were not in conformity with Art. III. Such courts were

---

[15] JUSTICE WHITE's dissent finds particular significance in the fact that Congress could have assigned all bankruptcy matters to the state courts. *Post*, at 116. But, of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts. This fact is simply irrelevant to the question before us. Congress has no control over state-court judges; accordingly the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges. See Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional, 70 Geo. L. J. 297, 304–305 (1981). The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice. See Hart and Wechsler's The Federal Courts and the Federal System, *supra* n. 11, at 11. But the Framers did not leave it to Congress to define the character of those courts—they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure.

> "created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested . . . is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the third article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government." 1 Pet., at 546.

The Court followed the same reasoning when it reviewed Congress' creation of non-Art. III courts in the District of Columbia. It noted that there was in the District

> "no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice." *Kendall* v. *United States*, 12 Pet. 524, 619 (1838).[16]

---

[16] We recently reaffirmed the principle, expressed in these early cases, that Art. I, § 8, cl. 17, provides that Congress shall have power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. *Palmore* v. *United States*, 411 U. S., at 397. See also *Wallace* v. *Adams*, 204 U. S. 415, 423 (1907) (recognizing Congress' authority to establish legislative courts to determine questions of tribal membership relevant to property claims within Indian territory); *In re Ross*, 140 U. S. 453 (1891) (same, respecting consular courts established by concession

Appellants next advert to a second class of cases—those in which this Court has sustained the exercise by Congress and the Executive of the power to establish and administer courts-martial. The situation in these cases strongly resembles the situation with respect to territorial courts: It too involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue. Article I, § 8, cls. 13, 14, confer upon Congress the power "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." The Fifth Amendment, which requires a presentment or indictment of a grand jury before a person may be held to answer for a capital or otherwise infamous crime, contains an express exception for "cases arising in the land or naval forces." And Art. II, § 2, cl. 1, provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Noting these constitutional directives, the Court in *Dynes* v. *Hoover*, 20 How. 65 (1857), explained:

> "These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other." *Id.*, at 79.[17]

---

from foreign countries). See generally 1 J. Moore, J. Lucas, H. Fink, D. Weckstein, & J. Wicker, Moore's Federal Practice 46–49, 53–54 (1982). But see *Reid* v. *Covert*, 354 U. S. 1 (1957).

[17] See also *Burns* v. *Wilson*, 346 U. S. 137, 139–140 (1953). But this Court has been alert to ensure that Congress does not exceed the constitutional bounds and bring within the jurisdiction of the military courts mat-

Finally, appellants rely on a third group of cases, in which this Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights."[18] The "public rights" doctrine was first set forth in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856):

> "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.*, at 284 (emphasis added).

This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. See *id.*, at 283–285; see also *Ex parte Bakelite Corp.*, 279 U. S. 438, 452 (1929). But the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government. The doctrine extends only to matters arising "between the Gov-

---

ters beyond that jurisdiction, and properly within the realm of "judicial power." See, *e. g., Reid* v. *Covert, supra; United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955).

[18] Congress' power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to provide for review of those agency decisions in Art. III courts. See, *e. g., Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 450 (1977).

ernment and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," *Crowell* v. *Benson*, 285 U. S. 22, 50 (1932), and only to matters that historically could have been determined exclusively by those departments, see *Ex parte Bakelite Corp.*, *supra*, at 458. The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency. *Crowell* v. *Benson*, *supra*, at 50.[19]

The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently . . . judicial." *Ex parte Bakelite Corp.*, *supra*, at 458. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How., at 280–282. For example, the Court in *Murray's Lessee* looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. *Ibid.* Concluding that the matter had not traditionally been one for judicial determination, the Court perceived no bar to Congress' establishment of summary procedures, outside of Art. III courts, to collect a debt due to the Government from one of its customs agents.[20] On the same premise, the Court in *Ex*

---

[19] See *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909); Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 915 (1930).

[20] Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the Government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.

parte Bakelite Corp., *supra*, held that the Court of Customs Appeals had been properly constituted by Congress as a legislative court:

> "The *full* province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. . . . The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of *which may be, and at times has been, committed exclusively to executive officers*." 279 U. S., at 458 (emphasis added).[21]

The distinction between public rights and private rights has not been definitively explained in our precedents.[22] Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others." *Ex parte Bakelite Corp.*, *supra*, at 451.[23] In contrast, "the liability of one individual to another under the law as defined," *Crowell* v. *Benson, supra,* at 51, is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n,* 430 U. S. 442, 450, n. 7 (1977); *Crowell* v. *Benson, supra,* at 50–51. See also Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 917–918 (1930).[24] Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

---

[21] See also *Williams* v. *United States*, 289 U. S. 553 (1933) (holding that Court of Claims was a legislative court and that salary of a judge of that court could therefore be reduced by Congress).

[22] *Crowell* v. *Benson*, 285 U. S. 22 (1932), attempted to catalog some of the matters that fall within the public-rights doctrine:

"Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Id.*, at 51 (footnote omitted).

[23] Congress cannot "withdraw from [Art. III] judicial cognizance *any* matter which, *from its nature*, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856) (emphasis added). It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing "private rights" from "public rights." And it is also clear that even with respect to matters that arguably fall within the scope of the "public rights" doctrine, the presumption is in favor of Art. III courts. See *Glidden Co.* v. *Zdanok*, 370

In sum, this Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.[25]

U. S., at 548–549, and n. 21 (opinion of Harlan, J.). See also Currie, The Federal Courts and the American Law Institute, Part 1, 36 U. Chi. L. Rev. 1, 13–14, n. 67 (1968). Moreover, when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review. See *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n,* 430 U. S., at 455, n. 13.

[24] Of course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party. See, *e. g., United States ex rel. Toth* v. *Quarles,* 350 U. S. 11 (1955).

[25] The "unifying principle" that JUSTICE WHITE's dissent finds lacking in all of these cases, see *post,* at 105, is to be found in the exceptional constitutional grants of power to Congress with respect to certain matters. Although the dissent is correct that these grants are not explicit in the language of the Constitution, they are nonetheless firmly established in our historical understanding of the constitutional structure. When these three exceptional grants are properly constrained, they do not threaten the Framers' vision of an independent Federal Judiciary. What clearly remains subject to Art. III are all private adjudications in federal courts

We discern no such exceptional grant of power applicable in the cases before us. The courts created by the Bankruptcy Act of 1978 do not lie exclusively outside the States of the Federal Union, like those in the District of Columbia and the Territories. Nor do the bankruptcy courts bear any resemblance to courts-martial, which are founded upon the Constitution's grant of plenary authority over the Nation's military forces to the Legislative and Executive Branches. Finally, the substantive legal rights at issue in the present action cannot be deemed "public rights." Appellants argue that a discharge in bankruptcy is indeed a "public right," similar to such congressionally created benefits as "radio station licenses, pilot licenses, or certificates for common carriers" granted by administrative agencies. See Brief for United States 34. But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not. Appellant Northern's right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one

---

within the States—matters from their nature subject to "a suit at common law or in equity or admiralty"—and all criminal matters, with the narrow exception of military crimes. There is no doubt that when the Framers assigned the "judicial Power" to an independent Art. III Branch, these matters lay at what they perceived to be the protected core of that power.

Although the dissent recognizes that the Framers had something important in mind when they assigned the judicial power of the United States to Art. III courts, it concludes that our cases and subsequent practice have eroded this conception. Unable to find a satisfactory theme in our precedents for analyzing these cases, the dissent rejects all of them, as well as the historical understanding upon which they were based, in favor of an ad hoc balancing approach in which Congress can essentially determine for itself whether Art. III courts are required. See *post*, at 105–116. But even the dissent recognizes that the notion that Congress rather than the Constitution should determine whether there is a need for independent federal courts cannot be what the Framers had in mind. See *post*, at 113.

individual to another under the law as defined." *Crowell* v. *Benson*, 285 U. S., at 51.[26]

Recognizing that the present cases may not fall within the scope of any of our prior cases permitting the establishment of legislative courts, appellants argue that we should recognize an additional situation beyond the command of Art. III, sufficiently broad to sustain the Act. Appellants contend that Congress' constitutional authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, cl. 4, carries with it an inherent power to establish legislative courts capable of adjudicating "bankruptcy-related controversies." Brief for United States 14. In support of this argument, appellants rely primarily upon a quotation from the opinion in *Palmore* v. *United States*, 411 U. S. 389 (1973), in which we stated that

> "both Congress and this Court have recognized that . . . the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.*, 407–408.

Appellants cite this language to support their proposition that a bankruptcy court created by Congress under its Art. I powers is constitutional, because the law of bankruptcy is a "specialized area," and Congress has found a "particularized need" that warrants "distinctive treatment." Brief for United States 20–33.

---

[26] This claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization. See *Williams* v. *Austrian*, 331 U. S. 642 (1947); *Schumacher* v. *Beeler*, 293 U. S. 367 (1934). See also *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 611–613 (1949) (Rutledge, J., concurring); *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 472 (1957) (Frankfurter, J., dissenting). Cf. *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824). But this relationship does not transform the state-created right into a matter between the Government and the petitioner for reorganization. Even in the absence of the federal scheme, the plaintiff would be able to proceed against the defendant on the state-law contractual claims.

Appellants' contention, in essence, is that pursuant to any of its Art. I powers, Congress may create courts free of Art. III's requirements whenever it finds that course expedient. This contention has been rejected in previous cases. See, *e. g., Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n,* 430 U. S., at 450, n. 7; *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11 (1955). Although the cases relied upon by appellants demonstrate that independent courts are not required for *all* federal adjudications, those cases also make it clear that where Art. III does apply, all of the legislative powers specified in Art. I and elsewhere are subject to it. See, *e. g., Ex parte Bakelite Corp.,* 279 U. S., at 449; *United States ex rel. Toth* v. *Quarles, supra; American Ins. Co.* v. *Canter,* 1 Pet., at 546; *Murray's Lessee,* 18 How., at 284. Cf. *Crowell* v. *Benson, supra,* at 51.

The flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of "specialized" legislative courts. True, appellants argue that under their analysis Congress could create legislative courts pursuant only to some "specific" Art. I power, and "only when there is a particularized need for distinctive treatment." Brief for United States 22–23. They therefore assert that their analysis would not permit Congress to replace the independent Art. III Judiciary through a "wholesale assignment of federal judicial business to legislative courts." *Ibid.* But these "limitations" are wholly illusory. For example, Art. I, § 8, empowers Congress to enact laws, *inter alia,* regulating interstate commerce and punishing certain crimes. Art. I, § 8, cls. 3, 6. On appellants' reasoning Congress could provide for the adjudication of these and "related" matters by judges and courts within Congress' exclusive control.[27] The potential for encroachment upon powers reserved to the Judicial Branch through the device of "specialized" legislative courts is dramatically evidenced in the jurisdiction granted to the courts created by the Act before us. The broad range of questions that can be brought into a bankruptcy court because they are "related to cases under title 11," 28 U. S. C. § 1471(b) (1976 ed., Supp. IV), see *supra*, at 54, is the clearest proof that even when Congress acts through a "specialized" court, and pursuant to only one of its many Art. I powers, appellants' analysis fails to provide any real protection against the erosion of Art. III jurisdiction by the unilateral action of the political Branches. In short, to accept appellants' reasoning, would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government.[28]

---

[27] Nor can appellants' analysis logically be limited to Congress' Art. I powers. For example, appellants' reasoning relies in part upon analogy to our approval of territorial courts in *American Ins. Co.* v. *Canter*, 1 Pet. 511 (1828), and of the use of an administrative agency in *Crowell* v. *Benson*, 285 U. S. 22 (1932). Brief for United States 15; Brief for Northern Pipeline Construction Co. 10. In those cases the Court recognized the right of Congress to create territorial courts pursuant to the authority granted under Art. IV, § 3, cl. 2, and to create administrative tribunals to adjudicate rights in admiralty pursuant to the federal authority in Art. III, § 2, over admiralty jurisdiction. See *American Ins. Co.* v. *Canter*, *supra*, at 546; *Crowell* v. *Benson*, *supra*, at 39. This reliance underscores the fact that appellants offer no principled means of distinguishing between Congress' Art. I powers and any of Congress' other powers—including, for example, those conferred by the various amendments to the Constitution, *e. g.*, U. S. Const., Amdts. 13–16, 19, 23, 24, 26.

[28] JUSTICE WHITE's suggested "limitations" on Congress' power to create Art. I courts are even more transparent. JUSTICE WHITE's dissent suggests that Art. III "should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities," and that the Court retains the final word on how the balance is

Appellants' reliance upon *Palmore* for such broad legislative discretion is misplaced. In the context of the issue decided in that case, the language quoted from the *Palmore* opinion, *supra*, at 72, offers no substantial support for appellants' argument. *Palmore* was concerned with the courts of the District of Columbia, a unique federal enclave over which "Congress has . . . entire control . . . for every purpose of government." *Kendall* v. *United States*, 12 Pet., at 619.

---

to be struck. *Post*, at 113–114. The dissent would find the Art. III "value" accommodated where appellate review by Art. III courts is provided and where the Art. I courts are "designed to deal with issues likely to be of little interest to the political branches." *Post*, at 115. But the dissent's view that appellate review is sufficient to satisfy either the command or the purpose of Art. III is incorrect. See n. 39, *infra*. And the suggestion that we should consider whether the Art. I courts are designed to deal with issues likely to be of interest to the political Branches would undermine the validity of the adjudications performed by most of the administrative agencies, on which validity the dissent so heavily relies.

In applying its ad hoc balancing approach to the facts of this case, the dissent rests on the justification that these courts differ from standard Art. III courts because of their "extreme specialization." As noted above, "extreme specialization" is hardly an accurate description of bankruptcy courts designed to adjudicate the entire range of federal and state controversies. See *infra*, at 84–85. Moreover, the special nature of bankruptcy adjudications is in no sense incompatible with performance of such functions in a tribunal afforded the protection of Art. III. As one witness pointed out to Congress:

"Relevant to that question of need, it seems worth noting that Article III itself permits much flexibility; so long as tenure during good behavior is granted, much room exists as regards other conditions. Thus it would certainly be possible to create a special bankruptcy court under Article III and there is no reason why the judges of that court would have to be paid the same salary as district judges or any other existing judges. It would also be permissible to provide that when a judge of that court retired pursuant to statute, a vacancy for a new appointment would not automatically be created. And it would be entirely valid to specify that the judges of that court could not be assigned to sit, even temporarily, on the general district courts or courts of appeals." Hearings on H. R. 31 and H. R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 2697 (1976) (letter of Paul Mishkin).

The "plenary authority" under the District of Columbia Clause, Art. I, § 8, cl. 17, was the subject of the quoted passage and the powers granted under that Clause are obviously different in kind from the other broad powers conferred on Congress: Congress' power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the Executive and Judicial powers as well as the Legislative. This is a power that is clearly possessed by Congress only in limited geographic areas. *Palmore* itself makes this limitation clear. The quoted passage distinguishes the congressional powers at issue in *Palmore* from those in which the Art. III command of an independent Judiciary must be honored: where "laws of national applicability and affairs of national concern are at stake." 411 U. S., at 408. Laws respecting bankruptcy, like most laws enacted pursuant to the national powers cataloged in Art. I, § 8, are clearly laws of national applicability and affairs of national concern. Thus our reference in *Palmore* to "specialized areas having particularized needs" referred only to *geographic* areas, such as the District of Columbia or territories outside the States of the Federal Union. In light of the clear commands of Art. III, nothing held or said in *Palmore* can be taken to mean that in every area in which Congress may legislate, it may also create non-Art. III courts with Art. III powers.

In sum, Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply. Nor can we discern any persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts here established lie beyond the reach of Art. III.

IV

Appellants advance a second argument for upholding the constitutionality of the Act: that "viewed within the entire judicial framework set up by Congress," the bankruptcy court is merely an "adjunct" to the district court, and that the delegation of certain adjudicative functions to the bankruptcy court is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts. See Brief for United States 11–13, 37–45. As support for their argument, appellants rely principally upon *Crowell* v. *Benson*, 285 U. S. 22 (1932), and *United States* v. *Raddatz*, 447 U. S. 667 (1980), cases in which we approved the use of administrative agencies and magistrates as adjuncts to Art. III courts. Brief for United States 40–42. The question to which we turn, therefore, is whether the Act has retained "the essential attributes of the judicial power," *Crowell* v. *Benson, supra*, at 51, in Art. III tribunals.[29]

The essential premise underlying appellants' argument is that even where the Constitution denies Congress the power to establish legislative courts, Congress possesses the authority to assign certain factfinding functions to adjunct tribunals. It is, of course, true that while the power to adjudicate "private rights" must be vested in an Art. III court, see Part III, *supra*,

> "this Court has accepted factfinding by an administrative agency, . . . as an adjunct to the Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master. *Crowell* v. *Benson*, 285 U. S. 22, 51–

---

[29] JUSTICE WHITE's dissent fails to distinguish between Congress' power to create adjuncts to Art. III courts, and Congress' power to create Art. I courts in limited circumstances. See *post*, at 103–104. Congress' power to create adjuncts and assign them limited adjudicatory functions is in no sense an "exception" to Art. III. Rather, such an assignment is consistent with Art. III, so long as "the essential attributes of the judicial power" are retained in the Art. III court, *Crowell* v. *Benson*, 285 U. S., at 51, and so long as Congress' adjustment of the traditional manner of adjudication can be sufficiently linked to its legislative power to define substantive rights, see *infra*, at 83–84. Cf. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S., at 450, n. 7.

> 65 (1932)." *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S., at 450, n. 7.

The use of administrative agencies as adjuncts was first upheld in *Crowell* v. *Benson, supra.* The congressional scheme challenged in *Crowell* empowered an administrative agency, the United States Employees' Compensation Commission, to make initial factual determinations pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. The Court began its analysis by noting that the federal statute administered by the Compensation Commission provided for compensation of injured employees "irrespective of fault," and that the statute also prescribed a fixed and mandatory schedule of compensation. *Id.*, at 38. The agency was thus left with the limited role of determining "questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee for which compensation is to be made." *Id.*, at 54. The agency did not possess the power to enforce any of its compensation orders: On the contrary, every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be "in accordance with law" and supported by evidence in the record. *Id.*, at 44–45, 48. The Court found that in view of these limitations upon the Compensation Commission's functions and powers, its determinations were "closely analogous to findings of the amount of damages that are made, according to familiar practice, by commissioners or assessors." *Id.*, at 54. Observing that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges," *id.*, at 51, the Court held that Art. III imposed no bar to the scheme enacted by Congress, *id.*, at 54.

Crowell involved the adjudication of congressionally created rights. But this Court has sustained the use of adjunct factfinders even in the adjudication of constitutional rights—

so long as those adjuncts were subject to sufficient control by an Art. III district court. In *United States* v. *Raddatz*, *supra*, the Court upheld the 1978 Federal Magistrates Act, which permitted district court judges to refer certain pretrial motions, including suppression motions based on alleged violations of constitutional rights, to a magistrate for initial determination. The Court observed that the magistrate's proposed findings and recommendations were subject to *de novo* review by the district court, which was free to rehear the evidence or to call for additional evidence. *Id.*, at 676–677, 681–683. Moreover, it was noted that the magistrate considered motions only upon reference from the district court, and that the magistrates were appointed, and subject to removal, by the district court. *Id.*, at 685 (BLACKMUN, J., concurring).[30] In short, the ultimate decisionmaking authority respecting all pretrial motions clearly remained with the district court. *Id.*, at 682. Under these circumstances, the Court held that the Act did not violate the constraints of Art. III. *Id.*, at 683–684.[31]

---

[30] Thus in *Raddatz* there was no serious threat that the exercise of the judicial power would be subject to incursion by other branches. "[T]he only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without the judicial department." 447 U. S., at 685 (BLACKMUN, J., concurring).

[31] Appellants and JUSTICE WHITE's dissent also rely on the broad powers exercised by the bankruptcy referees immediately before the Bankruptcy Act of 1978. See *post*, at 98–103. But those particular adjunct functions, which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee, see 1 Collier, *supra* n. 3, ¶ 1.02, have never been explicitly endorsed by this Court. In *Katchen* v. *Landy*, 382 U. S. 323 (1966), on which the dissent relies, there was no discussion of the Art. III issue. Moreover, when *Katchen* was decided the 1973 Bankruptcy Rules had not yet been adopted, and the district judge, after hearing the report of the referee, was free to "modify it or . . . reject it in whole or in part or . . . receive further evidence or . . . recommit it with instructions." General Order in Bankruptcy No. 47, 305 U. S. 702 (1939).

We note, moreover, that the 1978 Act made at least three significant changes from the bankruptcy practice that immediately preceded it. First, of course, the jurisdiction of the bankruptcy courts was "substan-

Together these cases establish two principles that aid us in determining the extent to which Congress may constitutionally vest traditionally judicial functions in non-Art. III officers. First, it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges.[32] Thus *Crowell* rec-

---

tially expanded" by the Act. H. R. Rep. No. 95–595, p. 13 (1977). Before the Act the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court. 11 U. S. C. § 46(b) (repealed). See *MacDonald* v. *Plymouth Trust Co.*, 286 U. S. 263, 266 (1932). It cannot be doubted that the new bankruptcy judges, unlike the referees, have jurisdiction far beyond that which can be even arguably characterized as merely incidental to the discharge in bankruptcy or a plan for reorganization. Second, the bankruptcy judges have broader powers than those exercised by the referees. See *infra*, at 84–86; H. R. Rep. No. 95–595, *supra*, at 12, and nn. 63–68. Finally, and perhaps most significantly, the relationship between the district court and the bankruptcy court was changed under the 1978 Act. Before the Act, bankruptcy referees were "subordinate adjuncts of the district courts." *Id.*, at 7. In contrast, the new bankruptcy courts are "independent of the United States district courts." *Ibid.*; 1 Collier *supra* n. 3, ¶1.03, p. 1–9. Before the Act, bankruptcy referees were appointed and removable only by the district court. 11 U. S. C. § 62 (repealed). And the district court retained control over the reference by his power to withdraw the case from the referee. Bkrtcy. Rule 102. Thus even at the trial stage, the parties had access to an independent judicial officer. Although Congress could still lower the salary of referees, they were not dependent on the political Branches of Government for their appointment. To paraphrase JUSTICE BLACKMUN's observation in *Raddatz*, *supra*, the primary "danger of a 'threat' to the 'independence' of the [adjunct came] from within, rather than without, the judicial department." 447 U. S., at 685 (concurring opinion).

[32] Contrary to JUSTICE WHITE's suggestion, we do not concede that "Congress may provide for initial adjudications by Art. I courts or administrative judges of all rights and duties arising under otherwise valid federal laws." See *post*, at 94. Rather we simply reaffirm the holding of *Crowell*—that Congress may assign to non-Art. III bodies some adjudica-

ognized that Art. III does not require "all determinations of fact [to] be made by judges," 285 U. S., at 51; with respect to congressionally created rights, some factual determinations may be made by a specialized factfinding tribunal designed by Congress, without constitutional bar, *id.*, at 54. Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court. Thus in upholding the adjunct scheme challenged in *Crowell*, the Court emphasized that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." *Ibid.* And in refusing to invalidate the Magistrates Act at issue in *Raddatz*, the Court stressed that under the congressional scheme "'[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge,'" 447 U. S., at 682, quoting *Mathews* v. *Weber*, 423 U. S. 261, 271 (1976); the statute's delegation of power was therefore permissible, since "the ultimate decision is made by the district court," 447 U. S., at 683.

These two principles assist us in evaluating the "adjunct" scheme presented in these cases. Appellants assume that Congress' power to create "adjuncts" to consider all cases related to those arising under Title 11 is as great as it was in the circumstances of *Crowell*. But while *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign factfinding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights, *Crowell* does not support the further proposition necessary to appellants' argument—that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not*

---

tory functions. *Crowell* itself spoke of "specialized" functions. These cases do not require us to specify further any limitations that may exist with respect to Congress' power to create adjuncts to assist in the adjudication of federal statutory rights.

created by Congress. Indeed, the validity of this proposition was expressly denied in *Crowell*, when the Court rejected "the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a *constitutional* right may be involved," 285 U. S., at 60–61 (emphasis added),[33] and stated that

> "the essential independence of the exercise of the judicial power of the United States in the enforcement of *constitutional* rights requires that the Federal court should determine . . . an issue [of agency jurisdiction] upon its own record and the facts elicited before it." *Id.*, at 64 (emphasis added).[34]

Appellants' proposition was also implicitly rejected in *Raddatz*. Congress' assignment of adjunct functions under the Federal Magistrates Act was substantially narrower than under the statute challenged in *Crowell*. Yet the Court's scrutiny of the adjunct scheme in *Raddatz*—which played a role in the adjudication of *constitutional* rights—was far stricter than it had been in *Crowell*. Critical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court. 447 U. S., at 683.

---

[33] The Court in *Crowell* found that the requirement of *de novo* review as to certain facts was not "simply the question of due process in relation to notice and hearing," but was "rather a question of the appropriate maintenance of the Federal judicial power." 285 U. S., at 56. The dissent agreed that some factual findings cannot be made by adjuncts, on the ground that "under certain circumstances, the constitutional requirement of due process is a requirement of [Art. III] judicial process." *Id.*, at 87 (Brandeis, J., dissenting).

[34] *Crowell's* precise holding, with respect to the review of "jurisdictional" and "constitutional" facts that arise within ordinary administrative proceedings, has been undermined by later cases. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53 (1936). See generally 4 K. Davis, Administrative Law Treatise §§ 29.08, 29.09 (1st ed. 1958). But the general principle of *Crowell*—distinguishing between congressionally created rights and constitutionally recognized rights—remains valid, as evidenced by the Court's recent approval of *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), on which *Crowell* relied. See *Agosto* v. *INS*, 436 U. S. 748, 753 (1978) (*de novo* judicial determination required for claims of American citizenship in deportation proceedings). See also *United States* v. *Raddatz*, 447 U. S., at 682–684; *id.*, at 707–712 (MARSHALL, J., dissenting).

Although *Crowell* and *Raddatz* do not explicitly distinguish between rights created by Congress and other rights, such a distinction underlies in part *Crowell*'s and *Raddatz*' recognition of a critical difference between rights created by federal statute and rights recognized by the Constitution. Moreover, such a distinction seems to us to be necessary in light of the delicate accommodations required by the principle of separation of powers reflected in Art. III. The constitutional system of checks and balances is designed to guard against "encroachment or aggrandizement" by Congress at the expense of the other branches of government. *Buckley* v. *Valeo*, 424 U. S., at 122. But when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.[35] Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

---

[35] Drawing the line between permissible extensions of legislative power and impermissible incursions into judicial power is a delicate undertaking, for the powers of the Judicial and Legislative Branches are often overlapping. As Justice Frankfurter noted in a similar context: "To be sure the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610 (1952) (concurring opinion). The interaction between the Legislative and Judicial Branches is at its height where courts are adjudicating rights wholly of Congress' creation. Thus where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right.

We hold that the Bankruptcy Act of 1978 carries the possibility of such an unwarranted encroachment. Many of the rights subject to adjudication by the Act's bankruptcy courts, like the rights implicated in *Raddatz*, are not of Congress' creation. Indeed, the cases before us, which center upon appellant Northern's claim for damages for breach of contract and misrepresentation, involve a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court.[36] Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III "adjunct," plainly must be deemed at a minimum. Yet it is equally plain that Congress has vested the "adjunct" bankruptcy judges with powers over Northern's state-created right that far exceed the powers that it has vested in administrative agencies that adjudicate only rights of Congress' own creation.

Unlike the administrative scheme that we reviewed in *Crowell*, the Act vests all "essential attributes" of the judicial power of the United States in the "adjunct" bankruptcy court. First, the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law. In contrast, the subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or *related to* cases under title 11." 28 U. S. C. § 1471(b) (1976 ed., Supp. IV) (emphasis added). Second, while the agency in *Crowell* engaged in statutorily channeled factfinding functions, the bankruptcy courts exercise "*all* of the jurisdiction" conferred by the Act on the district courts, § 1471(c) (emphasis added). Third, the agency in *Crowell* possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court. By contrast, the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, 28 U. S. C. § 1480 (1976 ed., Supp. IV), the power to issue declaratory judgments, § 2201, the power to issue writs of habeas corpus, § 2256, and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11, 11 U. S. C. § 105(a) (1976 ed., Supp. IV).[37] Fourth, while orders issued by the agency in *Crowell* were to be set aside if "not supported by the evidence," the judgments of the bankruptcy courts are apparently subject to review only under the more deferential "clearly erroneous" standard. See n. 5, *supra*. Finally, the agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal.[38] In short, the "adjunct" bankruptcy courts created by the Act exercise jurisdiction behind the facade of a grant to the district courts, and are exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*.[39]

---

[36] Of course, bankruptcy adjudications themselves, as well as the manner in which the rights of debtors and creditors are adjusted, are matters of federal law. Appellant Northern's state-law contract claim is now in federal court because of its relationship to Northern's reorganization petition. See n. 26, *supra*. But Congress has not purported to prescribe a rule of decision for the resolution of Northern's contractual claims.

---

[37] The limitations that the judges "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment," 28 U. S. C. § 1481 (1976 ed., Supp. IV), are also denied to Art. III judges under certain circumstances. See 18 U. S. C. §§ 401, 402, 3691; 28 U. S. C. § 2283.

---

[38] Although the entry of an enforcement order is in some respects merely formal, it has long been recognized that

> "'[t]he award of execution . . . is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment in the legal sense of the term, without it.'" *ICC* v. *Brimson*, 154 U. S. 447, 484 (1894), quoting Chief Justice Taney's memorandum in *Gordon* v. *United States*, 117 U. S. 697, 702 (1864).

[39] Appellants suggest that *Crowell* and *Raddatz* stand for the proposition that Art. III is satisfied so long as some degree of appellate review is provided. But that suggestion is directly contrary to the text of our Constitution: "The Judges, *both* of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall . . . receive [undiminished] Compensation." Art. III, § 1 (emphasis added). Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level. The Court responded to a similar suggestion in *Crowell* by stating that to accept such a regime,

> "would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." 285 U. S., at 57.

Cf. *Ward* v. *Village of Monroeville*, 409 U. S. 57, 61–62 (1972); *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 883 (1824).

JUSTICE WHITE's dissent views the function of the Third Branch as interpreting the Constitution in order to keep the other two Branches in check, and would accordingly find the purpose, if not the language, of Art. III satisfied where there is an appeal to an Art. III court. See *post*, at 115. But in the Framers' view, Art. III courts would do a great deal more than, in an abstract way, announce guidelines for the other two Branches. While "expounding" the Constitution was surely one vital function of the Art. III courts in the Framers' view, the tasks of those courts, for which independence was an important safeguard, included the mundane as well

We conclude that 28 U. S. C. § 1471 (1976 ed., Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.

V

Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in 28 U. S. C. § 1471 (1976 ed., Supp. IV) is unconstitutional, we must now determine whether our holding should be applied retroactively to the effective date of the Act.[40] Our decision in *Chevron*

---

as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law. As Hamilton noted, "it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society." The Federalist No. 78, p. 488 (H. Lodge ed. 1888). In order to promote the independence and improve the quality of federal judicial decisionmaking in all of these areas, the Framers created a system of independent federal courts. See The Federalist Nos. 78–82.

[40] It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under Title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. See H. R. Rep. No. 95–595, pp. 43–48 (1977); S. Rep. No. 95–989, p. 17 (1978). Nor can we assume, as THE CHIEF JUSTICE suggests, *post*,

Oil Co. v. *Huson*, 404 U. S. 97 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, *id.*, at 106; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, *id.*, at 107; and third, whether retroactive application "could produce substantial inequitable results" in individual cases, *ibid.* In the present cases, all of these considerations militate against the retroactive application of our holding today. It is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an unprecedented question of interpretation of Art. III. It is equally plain that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively.[41]

The judgment of the District Court is affirmed. However, we stay our judgment until October 4, 1982. This limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws. See *Buckley* v. *Valeo*, 424 U. S., at 143;

---

at 92, that Congress' choice would be to have these cases "routed to the United States district court of which the bankruptcy court is an adjunct." We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose.

[41] See also *Buckley* v. *Valeo*, 424 U. S. 1, 142 (1976); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 376–377 (1940); *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702, n. 9 (1982).

cf. *Georgia* v. *United States*, 411 U. S. 526, 541 (1973); *Fortson* v. *Morris*, 385 U. S. 231, 235 (1966); *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656, 675–676 (1964).

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

Were I to agree with the plurality that the question presented by these cases is "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U. S. C. § 1471 (1976 ed., Supp IV) by § 241(a) of the Bankruptcy Act of 1978 violates Art. III of the Constitution," *ante*, at 52, I would with considerable reluctance embark on the duty of deciding this broad question. But appellee Marathon Pipe Line Co. has not been subjected to the full range of authority granted bankruptcy courts by § 1471. It was named as a defendant in a suit brought by appellant Northern Pipeline Construction Co. in a United States Bankruptcy Court. The suit sought damages for, *inter alia*, breaches of contract and warranty. Marathon moved to dismiss the action on the grounds that the Bankruptcy Act of 1978, which authorized the suit, violated Art. III of the Constitution insofar as it established bankruptcy judges whose tenure and salary protection do not conform to the requirements of Art. III.

With the cases in this posture, Marathon has simply been named defendant in a lawsuit about a contract, a lawsuit initiated by appellant Northern after having previously filed a petition for reorganization under the Bankruptcy Act. Marathon may object to proceeding further with this lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises "[t]he judicial power of the United States" described by Art. III of the Constitution. But resolution of any objections it may make on this ground to the exercise of a different authority conferred on bankruptcy courts by the 1978 Act, see *ante*, at 54–55, should await the exercise of such authority.

> "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U. S, 33, 39." *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

Particularly in an area of constitutional law such as that of "Art. III Courts," with its frequently arcane distinctions and confusing precedents, rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy.

From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law. No method of adjudication is hinted, other than the traditional common-law mode of judge and jury. The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that court.

The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis. In the interval of nearly 150 years between *American Insurance Co.* v. *Canter*, 1 Pet. 511 (1828), and *Palmore* v. *United States*, 411 U. S. 389 (1973), the Court addressed the question infrequently. I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night, as JUSTICE WHITE apparently believes them to be. None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under that Act might be sustained under the "public rights" doctrine of *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856), and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.

I am likewise of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the bankruptcy court in a case such as Northern's does not save the grant of authority to the latter under the rule espoused in *Crowell* v. *Benson*, 285 U. S. 22 (1932). All matters of fact and law in whatever domains of the law to which the parties' dispute may lead are to be resolved by the bankruptcy court in the first instance, with only traditional appellate review by Art. III courts apparently contemplated. Acting in this manner the bankruptcy court is not an "adjunct" of either the district court or the court of appeals.

I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts under § 1471, see *ante*, at 87–88, n. 40, I concur in the judgment. I also agree with the discussion in Part V of the plurality opinion respecting retroactivity and the staying of the judgment of this Court.

CHIEF JUSTICE BURGER, dissenting.

I join JUSTICE WHITE's dissenting opinion, but I write separately to emphasize that, notwithstanding the plurality opinion, the Court does *not* hold today that Congress' broad grant of jurisdiction to the new bankruptcy courts is generally inconsistent with Art. III of the Constitution. Rather, the Court's holding is limited to the proposition stated by JUSTICE REHNQUIST in his concurrence in the judgment—that a "traditional" state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Art. III court" if it is to be heard by any court or agency of the United States. This limited holding, of course, does not suggest that there is something inherently unconstitutional about the new bankruptcy courts; nor does it preclude such courts from adjudicating all but a relatively narrow category of claims "arising under" or "arising in or related to cases under" the Bankruptcy Act.

It will not be necessary for Congress, in order to meet the requirements of the Court's holding, to undertake a radical restructuring of the present system of bankruptcy adjudication. The problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions, such as the one involved in these cases, be routed to the United States district court of which the bankruptcy court is an adjunct.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

Article III, § 1, of the Constitution is straightforward and uncomplicated on its face:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Any reader could easily take this provision to mean that although Congress was free to establish such lower courts as it saw fit, any court that it did establish would be an "inferior" court exercising "judicial Power of the United States" and so must be manned by judges possessing both life tenure and a guaranteed minimal income. This would be an eminently sensible reading and one that, as the plurality shows, is well founded in both the documentary sources and the political doctrine of separation of powers that stands behind much of our constitutional structure. *Ante*, at 57–60.

If this simple reading were correct and we were free to disregard 150 years of history, these would be easy cases and the plurality opinion could end with its observation that "[i]t is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges." *Ante*, at 60. The fact that the plurality must go on to deal with what has been characterized as one of the most confusing and controversial areas of constitutional law[1] itself indicates the gross oversimplification implicit in the plurality's claim that "our Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary [and] provides clear institutional protections for that independence." *Ibid.* While this is fine rhetoric, analytically it serves only to put a distracting and superficial gloss on a difficult question.

---

[1] *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 534 (1962) (plurality opinion of Harlan, J.).

That question is what limits Art. III places on Congress' ability to create adjudicative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution. Whether fortunate or unfortunate, at this point in the history of constitutional law that question can no longer be answered by looking only to the constitutional text. This Court's cases construing that text must also be considered. In its attempt to pigeonhole these cases, the plurality does violence to their meaning and creates an artificial structure that itself lacks coherence.

I

There are, I believe, two separate grounds for today's decision. First, non-Art. III judges, regardless of whether they are labeled "adjuncts" to Art. III courts or "Art. I judges," may consider only controversies arising out of federal law. Because the immediate controversy in these cases—Northern Pipeline's claim against Marathon—arises out of state law, it may only be adjudicated, within the federal system, by an Art. III court.[2] Second, regardless of the source of law that governs the controversy, Congress is prohibited by Art. III from establishing Art. I courts, with three narrow exceptions. Adjudication of bankruptcy proceedings does not fall within any of these exceptions. I shall deal with the first of these contentions in this section.

The plurality concedes that Congress may provide for initial adjudications by Art. I courts or administrative judges of all rights and duties arising under otherwise valid federal laws. *Ante*, at 80. There is no apparent reason why this principle should not extend to matters arising in federal bankruptcy proceedings. The plurality attempts to escape the reach of prior decisions by contending that the bankrupt's claim against Marathon arose under state law. Non-Article III judges, in its view, cannot be vested with authority to adjudicate such issues. It then proceeds to strike down 28 U. S. C. § 1471 (1976 ed., Supp. IV) on this ground. For several reasons, the Court's judgment is unsupportable.

---

[2] Because this is the sole ground relied upon by the Justices concurring in the judgment this is the effective basis for today's decision.

First, clearly this ground alone cannot support the Court's invalidation of § 1471 on its face. The plurality concedes that in adjudications and discharges in bankruptcy, "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," *ante*, at 71, and "the manner in which the rights of debtors and creditors are adjusted," *ante*, at 84, n. 36, are matters of federal law. Under the plurality's own interpretation of the cases, therefore, these matters could be heard and decided by Art. I judges. But because the bankruptcy judge is also given authority to hear a case like that of appellant Northern against Marathon, which the Court says is founded on state law, the Court holds that the section must be stricken down on its face. This is a grossly unwarranted emasculation of the scheme Congress has adopted. Even if the Court is correct that such a state-law claim cannot be heard by a bankruptcy judge, there is no basis for doing more than declaring the section unconstitutional as applied to the claim against Marathon, leaving the section otherwise intact. In that event, cases such as these would have to be heard by Art. III judges or by state courts—unless the defendant consents to suit before the bankruptcy judge—just as they were before the 1978 Act was adopted. But this would remove from the jurisdiction of the bankruptcy judge only a tiny fraction of the cases he is now empowered to adjudicate and would not otherwise limit his jurisdiction.[3]

---

[3] The plurality attempts to justify its sweeping invalidation of § 1471, because of its inclusion of state-law claims, by suggesting that this statutory provision is nonseverable. *Ante*, at 87–88, n. 40. The Justices concurring in the judgment specifically adopt this argument as the reason for their decision to join the judgment of the Court. The basis for the conclusion of nonseverability, however, is nothing more than a presumption: "Congress has vested juris-

Second, the distinction between claims based on state law and those based on federal law disregards the real character of bankruptcy proceedings. The routine in ordinary bankruptcy cases now, as it was before 1978, is to stay actions against the bankrupt, collect the bankrupt's assets, require creditors to file claims or be forever barred, allow or disallow claims that are filed, adjudicate preferences and fraudulent transfers, and make pro rata distributions to creditors, who will be barred by the discharge from taking further actions against the bankrupt. The crucial point to be made is that in the ordinary bankruptcy proceeding the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy—claims for goods sold, wages, rent, utilities, and the like. "[T]he word debt as used by the Act is not confined to its technical common law meaning but . . . extends to liabilities arising out of breach of contract . . . to torts . . . and to taxes owing to the United States or state or local governments." 1 W. Collier, Bankruptcy ¶1.14, p. 88 (14th ed. 1976). Every such claim must be filed and its validity is sub-

---

diction over this and all matters related to cases under Title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters." *Ante*, at 87, n. 40. Although it is possible, as a historical matter, to find cases of this Court supporting this presumption, see, *e. g., Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242 (1929), I had not thought this to be the contemporary approach to the problem of severability, particularly when dealing with federal statutes. I would follow the approach taken by the Court in *Buckley* v. *Valeo*, 424 U. S. 1, 108 (1976): "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" Quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U. S. 210, 234 (1932). This presumption seems particularly strong when Congress has already "enacted those provisions which are within its power, independently of that which is not"—*i. e.*, in the old Bankruptcy Act.

ject to adjudication by the bankruptcy court. The existence and validity of such claims recurringly depend on state law. Hence, the bankruptcy judge is constantly enmeshed in state-law issues.

The new aspect of the Bankruptcy Act of 1978, in this regard, therefore, is not the extension of federal jurisdiction to state-law claims, but its extension to particular kinds of state-law claims, such as contract cases against third parties or disputes involving property in the possession of a third person.[4] Prior to 1978, a claim of a bankrupt against a third party, such as the claim against Marathon in this case, was not within the jurisdiction of the bankruptcy judge. The old limits were based, of course, on the restrictions implicit within the concept of *in rem* jurisdiction; the new extension is based on the concept of *in personam* jurisdiction. "The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case." H. R. Rep. No. 95–595, p. 445 (1977). The difference between the new and old Acts, therefore, is not to be found in a distinction between state-law and federal-law matters; rather, it is in a distinction between *in rem* and *in personam* jurisdiction. The majority at no place explains why this distinction should have constitutional implications.

Third, all that can be left of the majority's argument in this regard is that state-law claims adjudicated within the federal system must be heard in the first instance by Art. III judges. I shall argue below that any such attempt to distinguish Art. I from Art. III courts by the character of the controversies they may adjudicate fundamentally misunderstands the historical and constitutional significance of Art. I courts. Initially, however, the majority's proposal seems to turn the separation-of-powers doctrine, upon which the majority relies, on its head: Since state-law claims would ordinarily not be heard by Art. III judges—*i. e.*, they would be heard by state judges—one would think that there is little danger of a diminution of, or intrusion upon, the power of Art. III courts, when such claims are assigned to a non-Art. III court. The plurality misses this obvious point because it concentrates on explaining how it is that federally created rights can ever be adjudicated in Art. I courts—a far more difficult problem under the separation-of-powers doctrine. The plurality fumbles when it assumes that the rationale it develops to deal with the latter problem must also govern the former problem. In fact, the two are simply unrelated and the majority never really explains the separation-of-powers problem that would be created by assigning state-law questions to legislative courts or to adjuncts of Art. III courts.

---

[4] Even this is not entirely new. Under the old Act, in certain circumstances, the referee could actually adjudicate and order the payment of a claim of the bankrupt estate against another. In *Katchen* v. *Landy*, 382 U. S. 323 (1966), for example, we recognized that when a creditor files a claim, the referee is empowered to hear and decide a counterclaim against that creditor arising out of the same transaction. A similar situation could arise in adjudicating setoffs under former § 68 of the Bankruptcy Act.

One need not contemplate the intricacies of the separation-of-powers doctrine, however, to realize that the majority's position on adjudication of state-law claims is based on an abstract theory that has little to do with the reality of bankruptcy proceedings. Even prior to the present Act, bankruptcy cases were generally referred to bankruptcy judges, previously called referees. Bkrtcy. Rule 102(a). Title 11 U. S. C. § 66 described the jurisdiction of the referees. Their powers included the authority to

> "consider all petitions referred to them and make the adjudications or dismiss the petitions . . . grant, deny or revoke discharges, determine the dischargeability of debts, and render judgments thereon [and] perform such of the duties as are by this title conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided."

The bankruptcy judge possessed "complete jurisdiction of the proceedings." 1 W. Collier, Bankruptcy ¶1.09, p. 65 (14th ed. 1976). The referee would initially hear and decide practically all matters arising in the proceedings, including the allowance and disallowance of the claims of creditors.[5] If a claim was disallowed by the bankruptcy judge and the decision was not reversed on appeal, the creditor was forever barred from further action against the bankrupt. As pointed out above, all of these matters could and usually did involve state-law issues. Initial adjudication of state-law issues by non-Art. III judges is, then, hardly a new aspect of the 1978 Act.

Furthermore, I take it that the Court does not condemn as inconsistent with Art. III the assignment of these functions—*i. e.*, those within the summary jurisdiction of the old bankruptcy courts—to a non-Art. III judge, since, as the plurality says, they lie at the core of the federal bankruptcy power. *Ante*, at 71. They also happen to be functions that have been performed by referees or bankruptcy judges for a very long time and without constitutional objection. Indeed, we approved the authority of the referee to allow or disallow claims in *Katchen* v. *Landy*, 382 U. S. 323 (1966). There, the referee held that a creditor had received a preference and that his claim could therefore not be allowed. We agreed that the referee had the authority not only to adjudicate the existence of the preference, but also to order that the preference be disgorged. We also recognized that the referee could adjudicate counterclaims against a creditor who files his claim against the estate. The 1973 Bankruptcy Rules make similar provision. See Rule 306(c), Rule 701, and Advisory Committee Note to Rule 701, 11 U. S. C., p. 1340. Hence, if Marathon had filed a claim against the bankrupt in this case, the trustee could have filed and the bankruptcy judge could have adjudicated a counterclaim seeking the relief that is involved in these cases.

---

[5] "The judicial act of allowance or disallowance is one, of course, that is performed by the referee where the proceedings have been generally referred." 3 W. Collier, Bankruptcy ¶57.14, p. 229, n. 3 (14th ed. 1977).

Of course, all such adjudications by a bankruptcy judge or referee were subject to review in the district court, on the record. See 11 U. S. C. § 67(c). Bankruptcy Rule 810, transmitted to Congress by this Court, provided that the district court "shall accept the referee's findings of fact unless they are clearly erroneous." As the plurality recognizes, *ante*, at 55, the 1978 Act provides for appellate review in Art. III courts and presumably under the same "clearly-erroneous standard." In other words, under both the old and new Acts, initial determinations of state-law questions were to be made by non-Art. III judges, subject to review by Art. III judges. Why the differences in the provisions for appeal in the two Acts are of unconstitutional dimension remains entirely unclear.

In theory and fact, therefore, I can find no basis for that part of the majority's argument that rests on the state-law character of the claim involved here. Even if, prior to 1978, the referee could not generally participate in cases aimed at collecting the assets of a bankrupt estate, he nevertheless repeatedly adjudicated issues controlled by state law. There is very little reason to strike down § 1471 on its face on the ground that it extends, in a comparatively minimal way, the referees' authority to deal with state-law questions. To do so is to lose all sense of proportion.

II

The plurality unpersuasively attempts to bolster its case for facial invalidity by asserting that the bankruptcy courts are now "exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*." *Ante*, at 86. In support of this proposition it makes five arguments in addition to the "state-law" issue. Preliminarily, I see no basis for according standing to Marathon to raise any of these additional points. The state-law objection applies to the Marathon case. Only that objection should now be adjudicated.[6]

I also believe that the major premise of the plurality's argument is wholly unsupported: There is no explanation of why *Crowell* v. *Benson*, 285 U. S. 22 (1932), and *United States* v. *Raddatz*, 447 U. S. 667 (1980), define the outer limits of constitutional authority. Much more relevant to today's decision are, first, the practice in bankruptcy prior to 1978, which neither the majority nor any authoritative case has questioned, and, second, the practice of today's administrative agencies. Considered from this perspective, all of the plurality's arguments are unsupportable abstractions, divorced from the realities of modern practice.

The first three arguments offered by the plurality, *ante*, at 85, focus on the narrowly defined task and authority of the agency considered in *Crowell:* The agency made only "specialized, narrowly confined factual determinations" and could issue only a narrow class of orders. Regardless of whether this was true of the Compensation Board at issue in *Crowell*, it certainly was not true of the old bankruptcy courts, nor does it even vaguely resemble current administrative practice. As I have already said, general references to bankruptcy judges, which was the usual practice prior to 1978, permitted bankruptcy judges to perform almost all of the functions of a bankruptcy court. Referees or bankruptcy judges not only exercised summary jurisdiction but could also conduct adversary proceedings to

> "(1) recover money or property . . . . (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to make a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay . . . (7) determine the dischargeability of a debt." Bkrtcy. Rule 701.

---

[6] On this point I am in agreement with the Justices concurring in the judgment.

Although there were some exceptions to the referees' authority, which have been removed by the 1978 Act, the additions to the jurisdiction of the bankruptcy judges were of marginal significance when examined in the light of the overall functions of those judges before and after 1978. In my view, those changes are not sufficient to work a qualitative change in the character of the bankruptcy judge.

The plurality's fourth argument fails to point to any difference between the new and old Bankruptcy Acts. While the administrative orders in *Crowell* may have been set aside by a court if "not supported by the evidence," under both the new and old Acts at issue here, orders of the bankruptcy judge are reviewed under the "clearly-erroneous standard." See Bkrtcy. Rule 810. Indeed, judicial review of the orders of bankruptcy judges is more stringent than that of many modern administrative agencies. Generally courts are not free to set aside the findings of administrative agencies, if supported by substantial evidence. But more importantly, courts are also admonished to give substantial deference to the agency's interpretation of the statute it is enforcing. No such deference is required with respect to decisions on the law made by bankruptcy judges.

Finally, the plurality suggests that, unlike the agency considered in *Crowell*, the orders of a post-1978 bankruptcy judge are final and binding even though not appealed. *Ante*, at 85–86. To attribute any constitutional significance to this, unless the plurality intends to throw into question a large body of administrative law, is strange. More directly, this simply does not represent any change in bankruptcy practice. It was hornbook law prior to 1978 that the authorized judgments and orders of referees, including turnover orders, were final and binding and res judicata unless appealed and overturned:

> "The practice before the referee should not differ from that before the judge of the court of bankruptcy and, apart from direct review within the limitation of § 39(c),

> the orders of the referee are entitled to the same presumption of validity, conclusiveness and recognition in the court of bankruptcy or other courts." 1 W. Collier, Bankruptcy ¶ 1.09, pp. 65–66 (14th ed. 1976).

Even if there are specific powers now vested in bankruptcy judges that should be performed by Art. III judges, the great bulk of their functions are unexceptionable and should be left intact. Whatever is invalid should be declared to be such; the rest of the 1978 Act should be left alone. I can account for the majority's inexplicably heavy hand in this case only by assuming that the Court has once again lost its conceptual bearings when confronted with the difficult problem of the nature and role of Art. I courts. To that question I now turn.

III

A

The plurality contends that the precedents upholding Art. I courts can be reduced to three categories. First, there are territorial courts, which need not satisfy Art. III constraints because "the Framers intended that as to certain geographical areas . . . Congress was to exercise the general powers of government."[7] *Ante*, at 64. Second, there are courts-martial, which are exempt from Art. III limits because of a constitutional grant of power that has been "historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue." *Ante*, at 66. Finally, there are those legislative courts and administrative agencies that adjudicate cases involving public rights—controversies between the Government and private parties—which are not covered by Art. III because the controversy could have been resolved by the executive alone without judicial review. See *ante*, at 68. Despite the plurality's attempt to cabin the domain of Art. I courts, it is quite unrealistic to consider these to be only three "narrow," *ante*, at 64, limitations on or exceptions to the reach of Art. III. In fact, the plurality itself breaks the mold in its discussion of "adjuncts" in Part IV, when it announces that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated." *Ante*, at 80. Adjudications of federal rights may, according to the plurality, be committed to administrative agencies, as long as provision is made for judicial review.

---

[7] The majority does not explain why the constitutional grant of power over the Territories to Congress is sufficient to overcome the strictures of Art. III, but presumably not sufficient to overcome the strictures of the Presentment Clause or other executive limits on congressional authority.

The first principle introduced by the plurality is geographical: Art. I courts presumably are not permitted within the States.[8] The problem, of course, is that both of the other exceptions recognize that Art. I courts can indeed operate within the States. The second category relies upon a new principle: Art. I courts are permissible in areas in which the Constitution grants Congress "extraordinary control over the precise subject matter." *Ante*, at 66. Preliminarily, I do not know how we are to distinguish those areas in which Congress' control is "extraordinary" from those in which it is not. Congress' power over the Armed Forces is established in Art. I, § 8, cls. 13, 14. There is nothing in those Clauses that creates congressional authority different in kind from the authority granted to legislate with respect to bankruptcy. But more importantly, in its third category, and in its treatment of "adjuncts," the plurality itself recognizes that Congress can create Art. I courts in virtually all the areas in which Congress is authorized to act, regardless of the quality of the constitutional grant of authority. At the same time, territorial courts or the courts of the District of Columbia, which are Art. I courts, adjudicate private, just as much as public or federal, rights.

---

[8] Had the plurality cited only the territorial courts, the principle relied on perhaps could have been the fact that power over the Territories is provided Congress in Art. IV. However, Congress' power over the District of Columbia is an Art. I power. As such, it does not seem to have any greater status than any of the other powers enumerated in Art. I, § 8.

Instead of telling us what it is Art. I courts can and cannot do, the plurality presents us with a list of Art. I courts. When we try to distinguish those courts from their Art. III counterparts, we find—apart from the obvious lack of Art. III judges—a series of nondistinctions. By the plurality's own admission, Art. I courts can operate throughout the country, they can adjudicate both private and public rights, and they can adjudicate matters arising from congressional actions in those areas in which congressional control is "extraordinary." I cannot distinguish this last category from the general "arising under" jurisdiction of Art. III courts.

The plurality opinion has the appearance of limiting Art. I courts only because it fails to add together the sum of its parts. Rather than limiting each other, the principles relied upon complement each other; together they cover virtually the whole domain of possible areas of adjudication. Without a unifying principle, the plurality's argument reduces to the proposition that because bankruptcy courts are not sufficiently like any of these three exceptions, they may not be either Art. I courts or adjuncts to Art. III courts. But we need to know why bankruptcy courts cannot qualify as Art. I courts in their own right.

B

The plurality opinion is not the first unsuccessful attempt to articulate a principled ground by which to distinguish Art. I from Art. III courts. The concept of a legislative, or Art. I, court was introduced by an opinion authored by Chief Justice Marshall. Not only did he create the concept, but at the same time he started the theoretical controversy that has ever since surrounded the concept:

> "The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred

> by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546 (1828).

The proposition was simple enough: Constitutional courts exercise the judicial power described in Art. III of the Constitution; legislative courts do not and cannot.

There were only two problems with this proposition. First, *Canter* itself involved a case in admiralty jurisdiction, which is specifically included within the "judicial power of the United States" delineated in Art. III. How, then, could the territorial court not be exercising Art. III judicial power? Second, and no less troubling, if the territorial courts could not exercise Art. III power, how could their decisions be subject to appellate review in Art. III courts, including this one, that can exercise only Art. III "judicial" power? Yet from early on this Court has exercised such appellate jurisdiction. *Benner* v. *Porter*, 9 How. 235, 243 (1850); *Clinton* v. *Englebrecht*, 13 Wall. 434 (1872); *Reynolds* v. *United States*, 98 U. S. 145, 154 (1879); *United States* v. *Coe*, 155 U. S. 76, 86 (1894); *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313 (1922). The attempt to understand the seemingly unexplainable was bound to generate "confusion and controversy." This analytic framework, however—the search for a principled distinction—has continued to burden the Court.

The first major elaboration on the *Canter* principle was in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18

How. 272 (1856). The plaintiff in that case argued that a proceeding against a customs collector for the collection of moneys claimed to be due to the United States was an exercise of "judicial power" and therefore had to be carried out by Art. III judges. The Court accepted this premise: "It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power." *Id.*, at 275. Having accepted this premise, the Court went on to delineate those matters which could be determined only by an Art. III court, *i. e.*, those matters that fall within the nondelegable "judicial power" of the United States. The Court's response to this was twofold. First, it suggested that there are certain matters which are inherently "judicial": "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Id.*, at 284. Second, it suggested that there is another class of issues that, depending upon the form in which Congress structures the decisionmaking process, may or may not fall within "the cognizance of the courts of the United States." *Ibid.* This latter category consisted of the so-called "public rights." Apparently, the idea was that Congress was free to structure the adjudication of "public rights" without regard to Art. III.

Having accepted the plaintiff's premise, it is hard to see how the Court could have taken too seriously its first contention. The Court presented no examples of such issues that are judicial "by nature" and simply failed to acknowledge that Art. I courts already sanctioned by the Court—*e. g.*, territorial courts—were deciding such issues all the time. The second point, however, contains implicitly a critical insight; one that if openly acknowledged would have undermined the entire structure. That insight follows from the Court's earlier recognition that the term "judicial act" is broad enough to encompass all administrative action involving inquiry into facts and the application of law to those facts. *Id.*, at 280. If administrative action can be characterized as "judicial" in nature, then obviously the Court's subsequent attempt to distinguish administrative from judicial action on the basis of the manner in which Congress structures the decision cannot succeed. There need be no Art. III court involvement in any adjudication of a "public right," which the majority now interprets as any civil matter arising between the Federal Government and a citizen. In that area, whether an issue is to be decided by an Art. III court depends, finally, on congressional intent.

Although *Murray's Lessee* implicitly undermined Chief Justice Marshall's suggestion that there is a difference in kind between the work of Art. I and that of Art. III courts, it did not contend that the Court must always defer to congressional desire in this regard. The Court considered the plaintiff's contention that removal of the issue from an Art. III court must be justified by "necessity." Although not entirely clear, the Court seems to have accepted this proposition: "[I]t seems to us that the just inference from the entire law is, that there was such a necessity for the warrant." *Id.*, at 285.[9]

The Court in *Murray's Lessee* was precisely right: Whether an issue can be decided by a non-Art. III court does not depend upon the judicial or nonjudicial character of the issue, but on the will of Congress and the reasons Congress offers for not using an Art. III court. This insight, however, was completely disavowed in the next major case to consider the distinction between Art. I and Art. III courts, *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929), in which the Court concluded that the Court of Customs Appeals was a legislative court. The Court there directly embraced the principle also articulated in *Murray's Lessee* that Art. I courts may not consider any matter "which inherently or necessarily requires judicial determination," but only such matters as are "susceptible of legislative or executive determination." 279 U. S., at 453. It then went on effectively to bury the critical insight of *Murray's Lessee*, labeling as "fallacious" any argument that "assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U. S., at 459.[10]

---

[9] By stating that "of this necessity congress alone is the judge," 18 How., at 285, the Court added some serious ambiguity to the standard it applied. Because this statement ends the Court's analysis of the merits of the claim, it does not seem to mean that the Court will simply defer to congressional judgment. Rather, it appears to mean that the Court will review the legislative record to determine whether there appeared to Congress to be compelling reasons for not establishing an Art. III court.

The distinction between public and private rights as the principle delineating the proper domains of legislative and constitutional courts respectively received its death blow, I had believed, in *Crowell* v. *Benson*, 285 U. S. 22 (1932). In that case, the Court approved an administrative scheme for the determination, in the first instance, of maritime employee compensation claims. Although acknowledging the framework set out in *Murray's Lessee* and *Ex parte Bakelite Corp.*, the Court specifically distinguished the case before it: "The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined."[11] 285 U. S., at 51. Nevertheless, the Court approved of the use of an Art. I adjudication mechanism on the new theory that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Ibid.* Article I courts could deal not only with public rights, but also, to an extent, with private rights. The Court now established a distinction between questions of fact and law: "[T]he reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."[12] *Id.*, at 54.

---

[10] The Court did not, however, entirely follow this principle, for it stated elsewhere that "there is propriety in mentioning the fact that Congress always has treated [the Court of Claims as an Art. I court]." 279 U. S., at 454.

[11] The plurality is clearly wrong in citing *Crowell* in support of the proposition that matters involving private, as opposed to public, rights may not be considered in a non-Art. III court. *Ante*, at 70.

Whatever sense *Crowell* may have seemed to give to this subject was exceedingly short-lived. One year later, the Court returned to this subject, abandoning both the public/private and the fact/law distinction and replacing both with a simple literalism. In *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), considering the courts of the District of Columbia, and in *Williams* v. *United States*, 289 U. S. 553 (1933), considering the Court of Claims, the Court adopted the principle that if a federal court exercises jurisdiction over cases of the type listed in Art. III, §2, as falling within the "judicial power of the United States," then that court must be an Art. III court:

> "The provision of this section of the article is that the 'judicial power shall extend' to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is *ipso facto*, vested in such courts as inferior courts of the United States." *O'Donoghue*, *supra*, at 545.[13]

---

[12] *Crowell* also suggests that certain facts—constitutional or jurisdictional—must also be subject to *de novo* review in an Art. III court. I agree with the plurality that this aspect of *Crowell* has been "undermined by later cases," *ante*, at 82, n. 34. As a matter of historical interest, however, I would contend that *Crowell*'s holding with respect to these "facts" turned more on the questions of law that were inseparably tied to them, than on some notion of the inadequacy of a non-Art. III factfinder.

[13] *O'Donoghue* does not apply this principle wholly consistently: It still recognizes a territorial court exception to Art. III's requirements. It now

In order to apply this same principle and yet hold the Court of Claims to be a legislative court, the Court found it necessary in *Williams, supra,* to conclude that the phrase "Controversies to which the United States shall be a party" in Art. III must be read as if it said "Controversies to which the United States shall be a party plaintiff or petitioner."[14]

By the time of the *Williams* decision, this area of the law was mystifying to say the least. What followed helped very little, if at all. In the next two major cases the Court could not agree internally on a majority position. In *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582 (1949), the Court upheld a statute giving federal district courts jurisdiction over suits between citizens of the District of Columbia and citizens of a State. A majority of the Court, however, rejected the plurality position that Congress had the authority to assign Art. I powers to Art. III courts, at least outside of the District of Columbia. Only Chief Justice Vinson in dissent reflected on the other side of this problem: whether Art. I courts could be assigned Art. III powers. He entirely disagreed with the conceptual basis for *Williams* and *O'Donoghue*, noting that to the extent that Art. I courts consider non-Art. III matters, appellate review by an Art. III court would be precluded. Or conversely, since appellate review is exercised by this Court over Art. I courts, Art. I courts must "exercise federal question jurisdiction." 337 U. S., at 643. Having gone this far, the Chief Justice was confronted with the obvious question of whether in fact "the distinction between constitutional and legislative courts is meaningless." *Id.*, at 644. Although suggesting that out-

---

bases this exception, however, not on any theoretical difference in principle, but simply on the "transitory character of the territorial governments." 289 U. S., at 536.

[14] See P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and The Federal System 399 (2d ed. 1973) (reviewing the problems of the *Williams* case and characterizing it as an "intellectual disaster").

side of the Territories or the District of Columbia there may be some limits on assignment to Art. I courts of matters that fall within Art. III jurisdiction—apart from federal-question jurisdiction—for the most part the Chief Justice ended up relying on the good will of Congress: "[W]e cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former." *Ibid.*

Another chapter in this somewhat dense history of a constitutional quandary was provided by Justice Harlan's plurality opinion in *Glidden Co.* v. *Zdanok*, 370 U. S. 530 (1962), in which the Court, despite *Bakelite* and *Williams*—and relying on an Act of Congress enacted since those decisions—held the Court of Claims and the Court of Customs and Patent Appeals to be Art. III courts. Justice Harlan continued the process of intellectual repudiation begun by Chief Justice Vinson in *Tidewater*. First, it was clear to him that Chief Justice Marshall could not have meant what he said in *Canter* on the inability of Art. I courts to consider issues within the jursidiction of Art. III courts: "Far from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so." 370 U. S., at 545, n. 13. Second, exceptions to the requirements of Art. III, he thought, have not been founded on any principled distinction between Art. I issues and Art. III issues; rather, a "confluence of practical considerations," *id.*, at 547, accounts for this Court's sanctioning of Art. I courts:

> "The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives." *Id.*, at 547–548.

Finally, recognizing that there is frequently no way to distinguish between Art. I and Art. III courts on the basis of the work they do, Justice Harlan suggested that the only way to tell them apart is to examine the "establishing legislation" to see if it complies with the requirements of Art. III. This, however, comes dangerously close to saying that Art. III courts are those with Art. III judges; Art. I courts are those without such judges. One hundred and fifty years of constitutional history, in other words, had led to a simple tautology.

IV

The complicated and contradictory history of the issue before us leads me to conclude that Chief Justice Vinson and Justice Harlan reached the correct conclusion: There is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts. Unless we want to overrule a large number of our precedents upholding a variety of Art. I courts—not to speak of those Art. I courts that go by the contemporary name of "administrative agencies"—this conclusion is inevitable. It is too late to go back that far; too late to return to the simplicity of the principle pronounced in Art. III and defended so vigorously and persuasively by Hamilton in The Federalist Nos. 78–82.

To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Art. I court, or that there is no such abstract principle, is not to say that this Court must always defer to the legislative decision to create Art. I, rather than Art. III, courts. Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck.

Despite the principled, although largely mistaken, rhetoric expanded by the Court in this area over the years, such a balancing approach stands behind many of the decisions upholding Art. I courts. Justice Harlan suggested as much in *Glidden*, although he needlessly limited his consideration to the "temporary" courts that Congress has had to set up on a variety of occasions. In each of these instances, this Court has implicitly concluded that the legislative interest in creating an adjudicative institution of temporary duration outweighed the values furthered by a strict adherence to Art. III. Besides the territorial courts approved in *American Insurance Co.* v. *Canter*, 1 Pet. 511 (1828), these courts have included the Court of Private Land Claims, *United States* v. *Coe*, 155 U. S. 76 (1894), the Choctaw and Chickasaw Citizenship Court, *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899), and consular courts established in foreign countries, *In re Ross*, 140 U. S. 453 (1891). This same sort of "practical" judgment was voiced, even if not relied upon, in *Crowell* with respect to the Employees' Compensation Claims Commission, which was not meant to be of limited duration: "[W]e are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved." 285 U. S., at 54. And even in *Murray's Lessee*, there was a discussion of the "necessity" of Congress' adopting an approach that avoided adjudication in an Art. III court. 18 How., at 285.

This was precisely the approach taken to this problem in *Palmore* v. *United States*, 411 U. S. 389 (1973), which, contrary to the suggestion of the plurality, did not rest on any theory of territorial or geographical control. *Ante*, at 75–76. Rather, it rested on an evaluation of the strength of the legislative interest in pursuing in this manner one of its constitutionally assigned responsibilities—a responsibility not different in kind from numerous other legislative responsibilities. Thus, *Palmore* referred to the wide variety of Art. I courts, not just territorial courts. It is in this light that the critical statement of the case must be understood:

> "[T]he requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." 411 U. S., at 407–408.

I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Art. III. The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts.

To be more concrete: *Crowell*, *supra*, suggests that the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative courts, like appellate review of state-court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority. Obviously, therefore, a scheme of Art. I courts that provides for appellate review by Art. III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.

Similarly, as long as the proposed Art. I courts are designed to deal with issues likely to be of little interest to the political branches, there is less reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government. Chief Justice Vinson suggested as much when he stated that the Court should guard against any congressional attempt "to transfer jurisdiction

. . . for the purpose of emasculating" constitutional courts. *National Insurance Co.* v. *Tidewater Co.*, 337 U. S., at 644.

V

I believe that the new bankruptcy courts established by the Bankruptcy Act of 1978, 28 U. S. C. § 1471 (1976 ed., Supp. IV), satisfy this standard.

First, ample provision is made for appellate review by Art. III courts. Appeals may in some circumstances be brought directly to the district courts. 28 U. S. C. § 1334 (1976 ed., Supp. IV). Decisions of the district courts are further appealable to the court of appeals. § 1293. In other circumstances, appeals go first to a panel of bankruptcy judges, § 1482, and then to the court of appeals. § 1293. In still other circumstances—when the parties agree—appeals may go directly to the court of appeals. In sum, there is in every instance a right of appeal to at least one Art. III court. Had Congress decided to assign all bankruptcy matters to the state courts, a power it clearly possesses, no greater review in an Art. III court would exist. Although I do not suggest that this analogy means that Congress may establish an Art. I court wherever it could have chosen to rely upon the state courts, it does suggest that the critical function of judicial review is being met in a manner that the Constitution suggests is sufficient.

Second, no one seriously argues that the Bankruptcy Act of 1978 represents an attempt by the political branches of government to aggrandize themselves at the expense of the third branch or an attempt to undermine the authority of constitutional courts in general. Indeed, the congressional perception of a lack of judicial interest in bankruptcy matters was one of the factors that led to the establishment of the bankruptcy courts: Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner. H. R. Rep. No. 95–595, p. 14 (1977). Bankruptcy matters are, for the most part, private adjudications of little political significance.

Although some bankruptcies may indeed present politically controversial circumstances or issues, Congress has far more direct ways to involve itself in such matters than through some sort of subtle, or not so subtle, influence on bankruptcy judges. Furthermore, were such circumstances to arise, the Due Process Clause might very well require that the matter be considered by an Art. III judge: Bankruptcy proceedings remain, after all, subject to all of the strictures of that constitutional provision.[15]

Finally, I have no doubt that the ends that Congress sought to accomplish by creating a system of non-Art. III bankruptcy courts were at least as compelling as the ends found to be satisfactory in *Palmore* v. *United States*, 411 U. S. 389 (1973), or the ends that have traditionally justified the creation of legislative courts. The stresses placed upon the old bankruptcy system by the tremendous increase in bankruptcy cases were well documented and were clearly a matter to which Congress could respond.[16] I do not believe it is possible to challenge Congress' further determination that it was necessary to create a specialized court to deal with bankruptcy matters. This was the nearly uniform conclusion of all those that testified before Congress on the question of reform of the bankruptcy system, as well as the conclusion of the Commission on Bankruptcy Laws established by Congress in 1970 to explore possible improvements in the system.[17]

The real question is not whether Congress was justified in establishing a specialized bankruptcy court, but rather whether it was justified in failing to create a specialized, Art. III bankruptcy court. My own view is that the very fact of extreme specialization may be enough, and certainly has been enough in the past,[18] to justify the creation of a legislative court. Congress may legitimately consider the effect on the federal judiciary of the addition of several hundred specialized judges: We are, on the whole, a body of generalists.[19] The addition of several hundred specialists may substantially change, whether for good or bad, the character of the federal bench. Moreover, Congress may have desired to maintain some flexibility in its possible future responses to the general problem of bankruptcy. There is no question that the existence of several hundred bankruptcy judges with life tenure would have severely limited Congress' future options. Furthermore, the number of bankruptcies may fluctuate, producing a substantially reduced need for bankruptcy judges. Congress may have thought that, in that event, a bankruptcy specialist should not as a general matter serve as a judge in the countless nonspecialized cases that come before the federal district courts. It would then face the prospect of large numbers of idle federal judges. Finally, Congress may have believed that the change from bankruptcy referees to Art. I judges was far less dramatic, and so less disruptive of the existing bankruptcy and constitutional court systems, than would be a change to Art. III judges.

---

[15] See *Crowell* v. *Benson*, 285 U. S. 22, 87 (1932) (Brandeis, J., dissenting) ("If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under the circumstances, the constitutional requirement of due process is a requirement of judicial process").

[16] "During the past 30 years, the number of bankruptcy cases filed annually has increased steadily from 10,000 to over 254,000." H. R. Rep. No. 95-595, p. 21 (1977).

[17] See H. R. Doc. No. 93-137, pt. 1, pp. 85-96 (1973).

For all of these reasons, I would defer to the congressional judgment. Accordingly, I dissent.

---

[18] Consider, for example, the Court of Customs Appeals involved in *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929), or the variety of specialized administrative agencies that engage in some form of adjudication.

[19] In 1977, there were approximately 190 full-time and 30 part-time bankruptcy judges throughout the country. H. R. Rep. No. 95-595, at 9.

UNION LABOR LIFE INSURANCE CO. *v.* PIRENO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81-389. Argued April 27, 1982—Decided June 28, 1982*

As required by New York law, petitioner Union Labor Life Insurance Co. (ULL) issues health insurance policies covering certain policyholder claims for chiropractic treatments. Some ULL policies limit the company's liability to "reasonable" charges for "necessary" medical care and services. In order to determine whether particular chiropractors' treatments and fees were necessary and reasonable, ULL arranged with petitioner New York State Chiropractic Association (NYSCA), a professional association of chiropractors, to use the advice of its Peer Review Committee, which was established primarily to aid insurers in evaluating claims for chiropractic treatments, and which is composed of 10 practicing New York chiropractors. Respondent is a licensed chiropractor practicing in New York. On a number of occasions ULL referred his treatments of ULL policyholders, and his charges for those treatments, to the Committee for review. The Committee sometimes concluded that respondent's treatments were unnecessary or his charges unreasonable. Respondent brought suit in Federal District Court, alleging that petitioners' peer review practices violated § 1 of the Sherman Act because petitioners had used the Committee as the vehicle for their conspiracy to fix the prices that chiropractors would be permitted to charge for their services. The District Court granted petitioners' motion for summary judgment, dismissing respondent's complaint on the ground that ULL's use of NYSCA's Peer Review Committee was exempted from antitrust scrutiny by § 2(b) of the McCarran-Ferguson Act, which applies to the "business of insurance." The Court of Appeals reversed and remanded the action for further proceedings.

Held: ULL's use of NYSCA's Peer Review Committee does not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act, and thus is not exempt from antitrust scrutiny. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, controlling. Pp. 126-134.

---

*Together with No. 81-390, *New York State Chiropractic Assn.* v. *Pireno*, also on certiorari to the same court.

(a) There are three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *Royal Drug Co., supra.* Pp. 126–129.

(b) With regard to the first criterion, petitioners' arrangement plays no part in the spreading and underwriting of a policyholder's risk, because it is logically and temporally unconnected to the contract entered by the policyholder and ULL, which was the actual risk-transferring event. As to the second criterion, ULL's use of NYSCA's Peer Review Committee is distinct from ULL's contracts with its policyholders, and constitutes a separate arrangement between the insurer and third parties not engaged in the business of insurance. Nor does the challenged arrangement satisfy this criterion on the asserted ground that it directly involves the "interpretation" and "enforcement" of the insurance contract, because ULL's procedure for deciding whether claims are covered is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid. As respects the third criterion, it may be assumed that the challenged arrangement need not be denied the § 2(b) exemption *solely* because it involves parties outside the insurance industry—namely, practicing chiropractors serving on the Peer Review Committee. But such arrangements can hardly be said to lie at the center of the legislative concern underlying § 2(b), which was with the protection of *intra*-industry cooperation in the underwriting of risks. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in noninsurance markets. Pp. 130–134.

650 F. 2d 387, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 134.

T. Richard Kennedy argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 81–389 were *Edward Thompson* and *Philip R. Kastellec*. *Robert P. Borsody* filed a brief for petitioner in No. 81–390.

Susan M. Jenkins argued the cause for respondent in both cases. With her on the brief was *Ralph C. Wiegandt*.

Barry Grossman argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee, Assistant Attorney General Baxter, Deputy Solicitor General Shapiro, Jerrold J. Ganzfried,* and *Nancy C. Garrison.*†

---

†Briefs of *amici curiae* urging reversal were filed by *Richard A. Whiting* for the American Insurance Association et al.; by *Sidney S. Rosdeitcher* and *Richard D. Friedman* for the Health Insurance Association of America et al.; and by *David Crump* for the Legal Foundation of America.

Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Robert K. Corbin,* Attorney General of Arizona, and *Kenneth R. Reed,* Special Assistant Attorney General, *Steve Clark,* Attorney General of Arkansas, and *David L. Williams,* Deputy Attorney General, *J. D. MacFarlane,* Attorney General of Colorado, and *Thomas P. McMahon, Carl R. Ajello,* Attorney General of Connecticut, and *Robert M. Langer* and *John R. Lacey,* Assistant Attorneys General, *Richard S. Gebelein,* Attorney General of Delaware, and *Vincent M. Amberly,* Deputy Attorney General, *Tany S. Hong,* Attorney General of Hawaii, and *Sonia Faust,* Deputy Attorney General, *Tyrone C. Fahner,* Attorney General of Illinois, and *Thomas M. Genovese,* Assistant Attorney General, *Thomas J. Miller,* Attorney General of Iowa, and *John R. Perkins,* Assistant Attorney General, *William J. Guste, Jr.,* Attorney General of Louisiana, and *John R. Flowers, Jr.,* Assistant Attorney General, *Stephen H. Sachs,* Attorney General of Maryland, and *Charles O. Monk II,* Assistant Attorney General, *Frank J. Kelley,* Attorney General of Michigan, and *Edwin M. Bladen,* Assistant Attorney General, *Bill Allain,* Attorney General of Mississippi, and *Robert E. Sanders,* Special Assistant Attorney General, *John Ashcroft,* Attorney General of Missouri, and *William L. Newcomb, Jr.,* and *Robert E. Dolan, Jr.,* Assistant Attorneys General, *Michael T. Greely,* Attorney General of Montana, and *Jerome J. Cate,* Assistant Attorney General, *Paul L. Douglas,* Attorney General of Nebraska, and *Dale A. Comer,* Assistant Attorney General, *Jeff Bingaman,* Attorney General of New Mexico, and *James J. Wechsler* and *Richard H. Levin,* Assistant Attorneys General, *Rufus L. Edmisten,* Attorney General of North Carolina, *H. A. Cole, Jr.,* Special Deputy Attorney General, and *John R. Corne,* Associate Attorney General, *William J. Brown,* Attorney General of Ohio, and *Eugene F. McShane, Dennis J. Roberts II,* Attorney General of Rhode Island, and *Patrick J. Quinlan,* Assistant Attorney General, *Mark White,* Attorney General of Texas, and *James V. Sylvester,* Assistant Attorney General, *David L. Wilkinson,* Attorney

JUSTICE BRENNAN delivered the opinion of the Court.

In these cases we consider an alleged conspiracy to eliminate price competition among chiropractors, by means of a "peer review committee" that advised an insurance company whether particular chiropractors' treatments and fees were "necessary" and "reasonable." The question presented is whether the alleged conspiracy is exempt from federal antitrust laws as part of the "business of insurance" within the meaning of the McCarran-Ferguson Act.[1]

I

Petitioners are the New York State Chiropractic Association (NYSCA), a professional association of chiropractors, and the Union Labor Life Insurance Co. (ULL), a Maryland insurer doing business in New York. As required by New York law, ULL's health insurance policies cover certain policyholder claims for chiropractic treatments. But certain ULL policies limit the company's liability to "the *reasonable* charges" for "*necessary* medical care and services."

General of Utah, *John J. Easton, Jr.*, Attorney General of Vermont, and *Glenn A. Jarrett*, Assistant Attorney General, and *Bronson C. La Follette*, Attorney General of Wisconsin, and *Michael L. Zaleski*, Assistant Attorney General; for the Association of American Physicians & Surgeons, Inc., by *Kent Masterson Brown;* and for Automotive Service Councils, Inc., by *Donald A. Randall* and *Jonathan T. Howe*.

David J. Brummond filed a brief for the National Association of Insurance Commissioners as *amicus curiae*.

[1] 59 Stat. 33, as amended, 15 U. S. C. §§ 1011–1015. The Act provides in relevant part:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance . . . ." § 2, 15 U. S. C. §§ 1012(a), (b).

"(b) Nothing contained in this Act shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." § 3, 15 U. S. C. § 1013(b).

App. 19a, 22a (emphasis added). Accordingly, when presented with a policyholder claim for reimbursement for chiropractic treatments, ULL must determine whether the treatments were necessary and whether the charges for them were reasonable. In making some of these determinations, ULL has arranged with NYSCA to use the advice of NYSCA's Peer Review Committee.

The Committee was established by NYSCA in 1971, primarily to aid insurers in evaluating claims for chiropractic treatments.[2] It is composed of 10 practicing New York chiropractors, who serve on a voluntary basis. At the request of an insurer, the Committee will examine a chiropractor's treatments and charges in a particular case, and will render an opinion on the necessity for the treatments and the reasonableness of the charges made for them. The opinion will be based upon such considerations as the treating chiropractor's experience and specialty degrees; the location of his office; the number of visits and time spent with the patient; the patient's age, occupation, general physical condition, and history of previous treatment; and X-ray findings.

Respondent is a chiropractor licensed and practicing in the State of New York. On a number of occasions his treatments of ULL policyholders, and his charges for those treatments, have been referred by ULL to the Committee, which has sometimes concluded that his treatments were unnecessary or his charges unreasonable. Petitioners assert that respondent has treated his patients "in a manner calculated to maximize the number of treatments for a particular condition, and that his fees for these treatments are unusually high." 650 F. 2d 387, 389 (CA2 1981). Respondent, for his part, contends that the members of the Committee "practice 'antiquated' techniques that they seek to impose on their more innovative competitors." *Ibid.*

---

[2] The Committee's advice is also available to patients, governmental agencies, and chiropractors themselves, but insurers are the principal users. 650 F. 2d 387, 388 (CA2 1981).

This dispute resulted in the present suit, brought by respondent in the United States District Court for the Southern District of New York. Respondent alleged that the peer review practices of petitioners violated § 1 of the Sherman Act.[3] In particular, he claimed that petitioners and others had used the Committee as the vehicle for a conspiracy to fix the prices that chiropractors, including respondent, would be permitted to charge for their services. He concluded that he had been restrained from providing his chiropractic services to the public freely and fully, and that would-be recipients of chiropractic services had been deprived of the benefits of competition. Respondent requested, *inter alia*, declaratory and injunctive relief against ULL's continued use of NYSCA's Peer Review Committee in evaluating policyholders' claims.

After extensive discovery, the District Court granted petitioners' motion for summary judgment dismissing respondent's complaint, concluding that ULL's use of NYSCA's Peer Review Committee was exempted from antitrust scrutiny by the McCarran-Ferguson Act. App. to Pet. for Cert. in No. 81-389, pp. 20a-37a. The court noted that three requirements must be met in order to obtain the McCarran-Ferguson exemption: The challenged practices (1) must constitute the "business of insurance," (2) must be regulated by state law, and (3) must not amount to a "boycott, coercion, or intimidation." *Id.*, at 27a-28a. In the court's view, all three of these requirements were satisfied in the present case. In particular, the court held that petitioners' peer review practices constituted the "business of insurance" because they served "to define the precise extent of ULL's contractual obligations . . . under [its] policies." *Id.*, at 29a–30a. Moreover, the court determined that the peer review practices "involve[d] the spreading of risk, an indispensable element of the 'business of insurance.'" *Id.*, at 30a.[4] Respondents' Sherman Act claim was accordingly dismissed with prejudice.

---

[3] 15 U. S. C. § 1, which provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

The Court of Appeals for the Second Circuit reversed. 650 F. 2d 387 (1981). Relying upon this Court's recent opinion in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979), the Court of Appeals concluded that the District Court had erred in holding that ULL's use of NYSCA's Peer Review Committee constituted the "business of insurance."[5] Accordingly, the Court of Appeals remanded the action for further proceedings. We granted certiorari to resolve a conflict among the Courts of Appeals on the question presented.[6] 454 U. S. 1052 (1981).

---

[4] The court then turned to the Act's second requirement, that the challenged practices be "regulated by state law." The court held that that requirement had been met, as well, observing that New York had "enacted a pervasive scheme of regulation and supervision of insurance," had prohibited "the unfair settlement of claims," and had proscribed "the conduct alleged in the complaint" in its state antitrust law, the Donnelly Act, which by its terms applied to insurers. App. to Pet. for Cert. in No. 81–389, pp. 31a–32a. Finally, the court determined that respondent had neither alleged a "boycott" on petitioners' part, nor offered evidentiary support for such a claim. *Id.*, at 33a–35a. The court thus concluded that the Act's third requirement was satisfied in the present case, and that petitioners' actions were consequently "exempt from application of the antitrust laws." *Id.*, at 36a.

[5] Since it reached this conclusion, the Court of Appeals did not definitively address the other holdings of the District Court. See n. 4, *supra*. The court did note, however, that petitioner NYSCA did not itself "appear to be regulated by state law in the manner § 2(b) requires." 650 F. 2d, at 390, n. 5.

[6] As noted by the Court of Appeals, *id.*, at 395, n. 13, the decision below is contrary to that of the Court of Appeals for the Fourth Circuit "in a factually identical case." See *Bartholomew* v. *Virginia Chiropractors Assn.*, 612 F. 2d 812 (1979).

II

The only issue before us is whether petitioners' peer review practices are exempt from antitrust scrutiny as part of the "business of insurance." "It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal." *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra,* at 210, n. 5. Thus in deciding these cases we have no occasion to address the merits of respondent's Sherman Act claims. However, the Sherman Act does express a "longstanding congressional commitment to the policy of free markets and open competition." *Community Communications Co.* v. *Boulder,* 455 U. S. 40, 56 (1982); see also *United States* v. *Topco Associates, Inc.,* 405 U. S. 596, 610 (1972). Accordingly, our precedents consistently hold that exemptions from the antitrust laws must be construed narrowly. *FMC* v. *Seatrain Lines, Inc.,* 411 U. S. 726, 733 (1973). This principle applies not only to implicit exemptions, see *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra,* at 231, but also to express statutory exemptions, see *United States* v. *McKesson & Robbins, Inc.,* 351 U. S. 305, 316 (1956). In *Royal Drug, supra,* this Court had occasion to reexamine the scope of the express antitrust exemption provided for the "business of insurance" by § 2(b) of the McCarran-Ferguson Act. We hold that decision of the question before us is controlled by *Royal Drug.*

The principal petitioner in *Royal Drug* was a Texas insurance company, Blue Shield, that offered policies entitling insured persons to purchase prescription drugs for $2 each from any pharmacy participating in a "Pharmacy Agreement" with Blue Shield; policyholders were also allowed to purchase prescription drugs from a nonparticipating pharmacy, but in that event they would have to pay full price for the drugs and would be reimbursed by Blue Shield for only a part of that price. Blue Shield offered Pharmacy Agreements to all licensed pharmacies in Texas, but participating pharmacies were required to sell prescription drugs to Blue

Shield's policyholders for $2 each, and were reimbursed only for their cost in acquiring the drugs thus sold. "Thus, only pharmacies that [could] afford to distribute prescription drugs for less than this $2 markup [could] profitably participate in the plan." 440 U. S., at 209 (footnote omitted).

Respondents in *Royal Drug* were the owners of nonparticipating pharmacies. They sued Blue Shield and several participating pharmacies under § 1 of the Sherman Act, alleging that the Pharmacy Agreements were the instrument by which Blue Shield had conspired with participating pharmacies to fix the retail prices of prescription drugs. Respondents also alleged that the Agreements encouraged Blue Shield's policyholders to avoid nonparticipating pharmacies, thus constituting an unlawful group boycott. The District Court granted summary judgment to Blue Shield and the other petitioners, holding that the challenged Agreements were exempt under § 2(b) of the McCarran-Ferguson Act. But the Court of Appeals disagreed, holding that the Agreements were not the "business of insurance" within the meaning of that Act, and reversed. 440 U. S., at 210. This Court affirmed. Looking to "the structure of the Act and its legislative history," *id.*, at 211, the Court discussed three characteristics of the business of insurance that Congress had intended to exempt through § 2(b).

First, after noting that one "indispensable characteristic of insurance" is the "spreading and underwriting of a policyholder's risk," *id.*, at 211–212,[7] the Court observed that parts of the legislative history of the McCarran-Ferguson Act "strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk," *id.*, at 220–221. The Court then dismissed Blue Shield's contention that its Pharmacy Agreements involved such activities.

---

[7] As the Court explained:

"'It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.' 1 G. Couch, Cyclopedia of Insurance Law § 1:3 (2d ed. 1959). See also R. Keeton, Insurance Law § 1.2(a) (1971) ('Insurance is an arrangement for transferring and distributing risk'); 1 G. Richards, The Law of Insurance § 2 (W. Freedman 5th ed. 1952)." 440 U. S., at 211 (footnote omitted).

> "The Pharmacy Agreements . . . are merely arrangements for the purchase of goods and services by Blue Shield. By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay to its policyholders. The Agreements thus enable Blue Shield to minimize costs and maximize profits. Such cost-savings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the 'business of insurance.'" *Id.*, at 214 (footnote omitted).

Second, the Court identified "the contract between the insurer and the insured" as "[a]nother commonly understood aspect of the business of insurance." *Id.*, at 215. The Court noted that, in enacting the McCarran-Ferguson Act, Congress had been concerned with the "'relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance."'" *Id.*, at 215–216, quoting *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 460 (1969). The Court then rejected Blue Shield's argument that its Pharmacy Agreements were so closely related to the "reliability, interpretation, and enforcement" of its policies as to fall within the intended scope of § 2(b): "This argument . . . proves too much." 440 U. S., at 216.

> "At the most, the petitioners have demonstrated that the Pharmacy Agreements result in cost savings to Blue Shield which may be reflected in lower premiums if the cost savings are passed on to policyholders. But, in that sense, every business decision made by an insurance company has some impact on its reliability, its rate-

> making, and its status as a reliable insurer . . . [and thus] could be included in the 'business of insurance.' Such a result would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies.'" *Id.*, at 216–217.

Finally, the Court noted that in enacting the McCarran-Ferguson Act, "the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws." *Id.*, at 221. This was so because of "the widespread view that it [was] very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation." *Ibid.* The Court was thus reluctant to extend the § 2(b) exemption to the case before it, "because the Pharmacy Agreements involve parties wholly outside the insurance industry." *Id.*, at 231.

> "There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the 'business of insurance.'" *Id.*, at 224 (footnote omitted).

In sum, *Royal Drug* identified three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself, but examining the arrangement between petitioners NYSCA and ULL with respect to all three criteria, we do not hesitate to conclude that it is not a part of the "business of insurance."

Plainly, ULL's use of NYSCA's Peer Review Committee plays no part in the "spreading and underwriting of a policyholder's risk." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S., at 211. Both the "spreading" and the "underwriting" of risk refer in this context to the transfer of risk characteristic of insurance. See n. 7, *supra*. And as the Court of Appeals below observed:

> "The risk that an insured will require chiropractic treatment has been transferred from the insured to [ULL] by the very purchase of insurance. Peer review takes place only after the risk has been transferred by means of the policy, and then it functions only to determine whether the risk of the entire loss (the insured's cost of treatment) has been transferred to [ULL]—that is, whether the insured's loss falls within the policy limits." 650 F. 2d, at 393.

Petitioner ULL argues that the Court of Appeals' analysis is "semantic and unrealistic." Brief for Petitioner ULL 17. Petitioner reasons that "[i]t is inconceivable that Congress would have included risk transfer within the 'business of insurance' but excluded a device that helps 'determine whether the risk . . . has been transferred' and acts as 'an aid in determining the scope of the transfer.'" *Ibid.* We find no merit in this argument, because the challenged peer review arrangement is logically and temporally unconnected to the transfer of risk accomplished by ULL's insurance policies. The transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered. See 9 G. Couch, Cyclopedia of Insurance Law §§ 39:53, 39:63 (2d ed. 1962). If the policy limits coverage to "necessary" treatments and "reasonable" charges for them, then that limitation is the measure of the risk that has actually been transferred to the insurer: To the extent that the insured pays unreasonable charges for unnecessary treatments, he will not be reimbursed, because the risk of incurring such treatments and charges was never transferred to the insurer, but was instead always retained by the insured. Petitioner's argument contains the unspoken premise that the transfer of risk from an insured to his insurer actually takes place not when the contract between those parties is completed, but rather only when the insured's claim is settled. This premise is contrary to the fundamental principle of insurance that the insurance policy defines the scope of risk assumed by the insurer from the insured. See *id.*, § 39:3; R. Keeton, Insurance Law § 5.1(a) (1971).

Turning to the second *Royal Drug* criterion, it is clear that ULL's use of NYSCA's Peer Review Committee is not an integral part of the policy relationship between insurer and insured. In the first place, the challenged arrangement between ULL and NYSCA is obviously distinct from ULL's contracts with its policyholders. In this sense the challenged arrangement resembles the Pharmacy Agreements in *Royal Drug.* There the Court rejected the proposition that the Agreements were "'between insurer and insured.'" *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra,* at 215, quoting *SEC* v. *National Securities, Inc.*, 393 U. S., at 460. Rather, it recognized those Agreements as "separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance." 440 U. S., at 216. Similarly, ULL's use of NYSCA's Peer Review Committee is a separate arrangement between the insurer and third parties not engaged in the business of insurance.

Petitioner ULL argues that the challenged peer review practices satisfy this criterion because peer review "directly involves the 'interpretation' and 'enforcement' of the insurance contract." Brief for Petitioner ULL 16. But this argument is essentially identical to one made and rejected in

Royal Drug. Blue Shield there contended that its Pharmacy Agreements "so closely affect[ed] the 'reliability, interpretation, and enforcement' of the insurance contract . . . as to fall within the exempted area." 440 U. S., at 216 (footnote omitted). This Court noted, however:

> "The benefit promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a $2 charge for each prescription. So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies." *Id.*, at 213–214 (footnotes omitted).

Similarly, when presented with policyholder claims for reimbursement, ULL must decide whether the claims are covered by its policies. But these decisions are entirely ULL's, and its use of NYSCA's Peer Review Committee as an aid in its decisionmaking process is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid. As in *Royal Drug*, petitioners have shown, at the most, that the challenged peer review practices result in "cost savings to [ULL] which may be reflected in lower premiums if the cost savings are passed on to policyholders." *Id.*, at 216. To grant the practices a § 2(b) exemption on such a showing "would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies.'" *Id.*, at 217.

Finally, as respects the third *Royal Drug* criterion, it is plain that the challenged peer review practices are not limited to entities within the insurance industry. On the contrary, ULL's use of NYSCA's Peer Review Committee inevitably involves third parties wholly outside the insurance industry—namely, practicing chiropractors. Petitioners do not dispute this fact, but instead deprecate its importance. They argue that we should not conclude "that ULL's use of the peer review process is outside the scope of the 'business of insurance' simply because NYSCA is not an insurance company." Brief for Petitioner ULL 25. In petitioners' view:

> "There is nothing in the McCarran-Ferguson Act that limits the 'business of insurance' to the business of insurance companies. As this Court has stated, '[the Act's] language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance."' *National Securities*, 393 U. S. at 459." *Ibid.* (emphasis in original of quoted opinion).

Asserting that "the [New York] Superintendent of Insurance effectively can regulate the peer review process through his authority over the claims adjustment procedures of ULL," *id.*, at 26, petitioners conclude that the process is part of the "business of insurance" despite the necessary involvement of third parties outside the insurance industry.

We may assume that the challenged peer review practices need not be denied the § 2(b) exemption *solely* because they involve parties outside the insurance industry. But the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis. As the Court noted there, § 2(b) was intended primarily to protect "*intra*-industry cooperation" in the underwriting of risks. 440 U. S., at 221 (emphasis added). Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in noninsurance markets. Indeed, the peer review practices challenged in the present cases assertedly realize precisely this potential: Respondent's claim is that the practices restrain competition in a provider market—the market for chiropractic services—rather than in an insurance market. App. 8a. Thus we cannot join petitioners in depreciating the fact that parties outside the insurance industry are intimately involved in the peer review practices at issue in these cases.[8]

III

In sum, we conclude that ULL's use of NYSCA's Peer Review Committee does not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act.[9] The judgment of the Court of Appeals is accordingly

Affirmed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Purporting to rely upon our recent decision in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979), the Court today exposes to antitrust liability an aspect of the business of insurance designed to promote fair and efficient claims settlement. The Court reaches this conclusion by determining that the peer review process does not spread risk, is not an integral part of the insurance relationship, and is not limited to entities within the insurance industry. Because I find the claims adjustment function of the Peer Review Committee to be at the heart of the relationship between insurance companies and their policyholders, I conclude that such committees are clearly within the sphere of insurance activity which the McCarran-Ferguson Act intended to protect from the effect of the antitrust laws.[1] This conclusion finds support in the legislative history of the Act and in *Royal Drug* and its predecessors.

---

[8] The premise of the dissent is that NYSCA's Peer Review Committee actually constitutes "the claims adjustor" in these cases. See *post*, at 137. From this premise the dissent reasons that since "claims adjustment is part and parcel of the 'business of insurance' protected by the McCarran-Ferguson Act," *post*, at 138, it necessarily follows that the peer review practices at issue in these cases must enjoy the Act's exemption. The fatal flaw in this syllogism is that NYSCA's Peer Review Committee is *not* the claims adjustor. As the Court of Appeals noted: "Opinions of the committee are not binding unless the parties agree beforehand that they will be." 650 F. 2d, at 388. Thus in a case such as the present ones, ULL is perfectly free to disregard the Committee's evaluation. Even if ULL were to act upon the Committee's opinion, the nonbinding nature of the Committee's evaluation means that, at most, peer review is merely ancillary to the claims adjustment process. We see no reason that such ancillary activities must necessarily enjoy the McCarran-Ferguson exemption from the antitrust laws. Unlike activities that occur wholly within the insurance industry—such as the claims adjustment process itself—the ancillary peer review practices at issue in these cases "involve parties wholly outside the insurance industry." See *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S., at 231. Thus peer review falls afoul of the third *Royal Drug* criterion in a way in which pure claims adjustment activities cannot.

[9] This conclusion renders it unnecessary for us to address the questions whether the conduct challenged in respondent's complaint was "regulated by state law" or constituted a "boycott, coercion, or intimidation." See n. 5, *supra*.

For many years statutes such as the Sherman Act were thought not applicable to the business of insurance, this Court having held in *Paul* v. *Virginia*, 8 Wall. 168, 183 (1869), that "[i]ssuing a policy of insurance is not a transaction of commerce." When this Court held in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), that the business of insurance was a part of interstate commerce subject to the Sherman Act, Congress responded quickly to reestablish the preeminence of States in regulating such business. Congress' response—the McCarran-Ferguson Act—sought primarily to protect the contractual relationship between the insurer and the insured:

> "Under the regime of *Paul* v. *Virginia*, *supra*, States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The

---

[1] Since the Court declines to reach the question of whether petitioners' Committee is regulated by state law as required by the McCarran-Ferguson Act, I likewise do not discuss it. I note, however, that the District Court found petitioners' Committee to be so regulated. App. to Pet. for Cert. in No. 81-389, pp. 31a-32a.

> *South-Eastern Underwriters* decision threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 459 (1969).

We recognized this congressional purpose in *Royal Drug:*

> "'The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.'" *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, *supra*, at 215–216 (quoting *SEC* v. *National Securities, Inc.*, *supra*, at 460).

Thus, whatever else was said in *Royal Drug* about the indispensable characteristic of risk-spreading, the Court found the contractual relationship between the insurer and the insured to be the essence of the "business of insurance."

Central to this contractual relationship is the process of claims adjustment—the determination of the actual payments to be made to the insured for losses covered by the insurance contract. The key representation of the insurance company and the principal expectation of the policyholder is that prompt payment will be made when the event insured against actually occurs. As one commentator has stated:

> "Up until the time there is a claim and a payment is made, the only tangible evidence of insurance is a piece of paper. In other words, the real product of insurance

> is the claims proceeds. Selection of the prospect, qualifying him for coverage that suits his needs, delivery of a policy, collecting premiums for perhaps years, making changes in coverage to meet changing situations, all of these are but preambles to the one purpose for which the insurance was secured, namely to collect dollars if and when an unforeseen event takes place." J. Wickman, Evaluating the Health Insurance Risk 57 (1965).[2]

It is the claims adjustor—in this case petitioners' Peer Review Committee—which determines whether and to what extent an insured's losses will be covered. The Court thus plainly errs when it concludes that the role of petitioners' Peer Review Committee "is not an integral part of the policy relationship between insurer and insured," *ante*, at 131, and "is a matter of indifference to the policyholder." *Ante*, at 132. Few insurance matters could be of greater importance to policyholders than whether their claims will be paid, and it is the Peer Review Committee which in effect makes that determination. Being a critical component of the relationship between an insurer and an insured, claims adjustment is part and parcel of the "business of insurance" protected by the McCarran-Ferguson Act.[3]

---

[2] Other commentators agree with this assessment of the importance of claims settlement:

"The adjustment (including payment) of claims represents the final act in the insurance process. The payment of a claim by an insurance company brings the insurance contract 'to life' in a fashion far more vivid than does any other single act in connection with the purchase, issuance, and maintenance of the contract." Butler, Loss Adjustment in Fire Insurance, in Property and Liability Insurance Handbook 219 (J. Long & D. Gregg eds. 1965).

"Claim administration is the last link in the process of insurance—a process that begins with actuarial analysis and continues through sales, underwriting, investment, and policy service. . . . [T]he expectation of the policyowner that an insurer is willing to meet its obligations, through claims administration, is an important part in the decision to purchase insurance. Indeed, it is the claim administration function that delivers on the product sold to the policyowner." C. Cissley, Claim Administration: Principles and Practices iii (1980).

This conclusion finds support in a source of guidance completely disregarded by the Court—the legislative history of McCarran-Ferguson. The passage of the Act was preceded by the introduction in the Senate Committee of a report and a bill prepared by the National Association of Insurance Commissioners. "The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S., at 221 (footnote omitted). Included in that bill were seven specific insurance practices to which the Sherman Act was not to apply, and to which the Court in *Royal Drug* looked for guidance as to the meaning of the phrase "business of insurance." See *id.*, at 222. Among those seven protected practices was the process of claims adjustment: "the said Sherman Act shall not apply . . . to any cooperative or joint service, *adjustment, investigation, or inspection agreement* relating to insurance." 90 Cong. Rec. A4406 (1944) (emphasis added). Other statements in the legislative history support the conclusion that claims adjustment was to be protected:

---

[3] Apparently unable to discern the difference between a mere method of paying a claim and the more fundamental process of determining whether a claim is covered by the insurance agreement, the Court finds that petitioners' peer review procedure "resembles the Pharmacy Agreements in *Royal Drug*." *Ante*, at 131. But the Pharmacy Agreement at issue in *Royal Drug* was simply a *method* of reimbursing policyowners for medication expenses. The policyowners could obtain medication from participating pharmacies simply by paying the amount that otherwise would not be covered by the insurance plan. The pharmacies thus constituted nothing more than in-kind dispensers of insurance payments; they played no role whatsoever in the more fundamental process of assessing the validity of a claim and determining the amount to be paid. Peer review committees, which fulfill such a fundamental role, are thus quite unlike the arrangements considered by the Court in *Royal Drug*.

> "[W]e come squarely to the question of whether State regulation is adequate to handle insurance, or whether that business should be subject to the provisions of the antitrust laws. . . . A great number of fire-insurance companies have cooperated in mutual agreement—and of necessity—through the Southeastern Underwriters Association and rating bureaus, adjusting policy rates to risks, classifying insurable property either in co-insurance or in re-insurance, *making appraisals of losses*, and working out systems of inspection to improve protection against fires. All of this has been done with splendid success. It would be a pity indeed, after all these years, to have the government intervene. The business of insurance involves long contracts. The fidelity of performance of those contracts will not brook intervention." *Id.*, at 6530 (remarks of Rep. Satterfield) (emphasis added).

See also *id.*, at 6543 (remarks of Rep. Jennings); *id.*, at 6550–6551 (remarks of Rep. Ploeser).

The role of claims adjustment in the insurance relationship and the legislative history of the Act thus unmistakably demonstrate that claims settlement procedures such as petitioners' Peer Review Committee were to be accorded protection from the antitrust laws as the "business of insurance." Few practices followed by insurance companies today present a fairer or more efficient means of claims resolution than professional peer review committees. Insurance claimants seek reimbursement for virtually every form of medical treatment and care, and determining the reasonableness and necessity of such expenses requires the expertise of a practicing physician. Because the entire spectrum of human ailments are involved, the views of one physician are seldom sufficient; specialists from many fields of medicine must be consulted. Few if any insurance companies can afford to staff their claims settlement departments with such a broad range of physicians. The companies thus must either make less than satisfactory claims determinations, or must turn to an outside group of experts such as petitioners' Committee.

Although the Court protests that its decision says nothing about petitioners' antitrust liability, there can be little doubt that today's decision will vastly curtail the peer review process. Few professionals or companies will be willing to expose themselves to possible antitrust liability through such activity. The Court thus not only misreads the McCarran-Ferguson Act and our prior precedents, but also eliminates an aspect of the American insurance industry which has long redounded to the benefit of insurance companies and policyholders alike.

FIDELITY FEDERAL SAVINGS & LOAN ASSOCIATION ET AL. *v.* DE LA CUESTA ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 81–750. Argued April 28, 1982—Decided June 28, 1982

Section 5(a) of the Home Owners' Loan Act of 1933 (HOLA) empowers the Federal Home Loan Bank Board (Board), under such regulations as it may prescribe, to provide for the organization, operation, and regulation of federal savings and loan associations. Pursuant to this authorization, the Board issued a regulation providing that a federal savings and loan association "continues to have the power to include . . . in its loan instrument" a "due-on-sale" clause, *i. e.*, a provision that permits the association to declare the entire balance of the loan immediately due and payable if the property securing the loan is sold or otherwise transferred without the association's prior written consent. A preamble to the regulation stated that the due-on-sale practices of federal savings and loan associations shall be governed "exclusively by Federal law" and that the association "shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements." Appellees each purchased California real property from one who had borrowed money from appellant Fidelity Federal Savings and Loan Association (Fidelity). The borrowers had given Fidelity deeds of trust on the property; each deed contained a due-on-sale clause. Fidelity, not having received prior notice of the purchases, proceeded to enforce the due-on-sale clauses to accelerate payment of the loans, and when they were not paid, instituted nonjudicial foreclosure proceedings. Each appellee then filed suit against Fidelity in California Superior Court, asserting that Fidelity's exercise of the due-on-sale clauses violated the principles announced in *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 582 P. 2d 970, which limited a lender's right to exercise such a clause to cases where the lender can demonstrate that the transfer of the property has impaired its security. The Superior Court consolidated the actions and granted Fidelity's motion for summary judgment on the ground that the Federal Government had totally occupied the regulation of federal savings and loan associations. The California Court of Appeal reversed, holding that *Wellenkamp* was controlling and that federal law had not expressly or impliedly pre-empted state due-on-sale law.

Held: The Board's due-on-sale regulation pre-empts conflicting state limitations on the due-on-sale practices of federal savings and loan associations, and thus bars application of the *Wellenkamp* rule to such associations. Pp. 152–170.

(a) The general principles governing pre-emption of state law that conflicts with federal law are not inapplicable here simply because real property is a matter of special concern to the States. And federal regulations have no less pre-emptive effect than federal statutes. Where Congress has empowered an administrator to promulgate regulations, regulations intended to pre-empt state law have that effect unless the administrator exceeded his statutory authority or acted arbitrarily. Pp. 152–154.

(b) The language of the Board's regulation and especially the preamble thereto clearly show the Board's intent to pre-empt the *Wellenkamp* doctrine. The conflict between that doctrine and the regulation does not evaporate because the regulation simply permits, but does not compel, federal savings and loan associations to include a due-on-sale clause in their contracts and to enforce that clause when the security property is transferred. While compliance with both the regulation and the *Wellenkamp* rule may not be a physical impossibility, that rule forbids a federal savings and loan association to enforce a due-on-sale clause at its option and deprives the association of the flexibility given it by the Board. The rule therefore creates an obstacle to the accomplishment of the regulation's purpose. Pp. 154–159.

(c) The Board acted within its statutory authority in issuing the pre-emptive due-on-sale regulation. Both the language and legislative history of the HOLA indicate that the Board was authorized to regulate the lending practices of federal savings and loan associations. Congress delegated power to the Board expressly for the purpose of creating and regulating these associations so as to ensure that they would remain financially sound and able to supply financing for home construction and purchase. Consistent with that purpose, the Board reasonably exercised its authority in promulgating the due-on-sale regulation. Pp. 159–170.

121 Cal. App. 3d 328, 175 Cal. Rptr. 467, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 171. REHNQUIST, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 172. POWELL, J., took no part in the consideration or decision of the case.

Ernest Leff argued the cause for appellants. With him on the briefs was *Andrew E. Katz*.

Deputy Solicitor General Shapiro argued the cause for the Federal Home Loan Bank Board et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Carter G. Phillips*, *Maud Mater*, *Gary S. Smuckler*, and *Marilyn Nathanson.*

Robert E. Boehmer argued the cause for appellees. With him on the brief was *John D. Meyer.**

---

*Briefs of *amici curiae* urging reversal were filed by *Daniel J. Goldberg* and *Matthew G. Ash* for the American Savings and Loan League; and by *Aaron M. Peck*, *C. Steven McMurry*, *Michael R. Grzanka*, *G. Howden Fraser*, *Terry O. Kelly*, and *Daniel H. Willick* for the United States League of Savings Associations.

Briefs of *amici curiae* urging affirmance were filed for the State of Michigan et al. by *Frank J. Kelley*, Attorney General of Michigan, *Louis J. Caruso*, Solicitor General, *Harry G. Iwasko, Jr.*, and *Robert Ianni*, Assistant Attorneys General, *John Steven Clark*, Attorney General of Arkansas, and *Frederick K. Campbell*, Assistant Attorney General, *Robert Corbin*, Attorney General of Arizona, and *Anthony B. Ching*, Solicitor General, *J. D. MacFarlane*, Attorney General of Colorado, and *Marshall A. Snider*, Assistant Attorney General, *Carl R. Ajello*, Attorney General of Connecticut, *Tyrone C. Fahner*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, and *W. Robert Alderson*, First Deputy Attorney General, *James E. Tierney*, Attorney General of Maine, *Warren R. Spannaus*, Attorney General of Minnesota, *William A. Allain*, Attorney General of Mississippi, *Michael T. Greely*, Attorney General of Montana, *Gregory H. Smith*, Attorney General of New Hampshire, *Jeff Bingaman*, Attorney General of New Mexico, *Rufus L. Edmisten*, Attorney General of North Carolina, *Millard Rich*, Deputy Attorney General, and *John R. B. Matthis*, Special Deputy Attorney General, *Robert O. Wefald*, Attorney General of North Dakota, *William J. Brown*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *Daniel R. McLeod*, Attorney General of South Carolina, *John J. Easton, Jr.*, Attorney General of Vermont, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Bronson C. La Follette*, Attorney General of Wisconsin; for the Secretary of the Business, Transportation and Housing Agency of the State of California by *George Deukmejian*, Attorney General of California, *Arthur C. De Goede*, Assistant Attorney General, *Joseph M. O'Heron*, Deputy Attorney General, and *W. Gary Kurtz*; for the California Association of Realtors et al. by *John R.*

JUSTICE BLACKMUN delivered the opinion of the Court.

At issue in this case is the pre-emptive effect of a regulation, issued by the Federal Home Loan Bank Board (Board), permitting federal savings and loan associations to use "due-on-sale" clauses in their mortgage contracts. Appellees dispute both the Board's intent and its statutory authority to displace restrictions imposed by the California Supreme Court on the exercise of these clauses.

I

A

The Board, an independent federal regulatory agency, was formed in 1932 and thereafter was vested with plenary authority to administer the Home Owners' Loan Act of 1933 (HOLA), 48 Stat. 128, as amended, 12 U. S. C. § 1461 *et seq.* (1976 ed. and Supp. IV).[1] Section 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV), empowers the Board,

---

Hetland and *Charles A. Hansen;* for the Consumer's Committee to Protect Mortgage Rights by *Irwin M. Alterman;* for the Georgia Assocation of Realtors, Inc., by *E. Catherine Kimmel;* for the National Association of Realtors by *William D. North* and *Robert D. Butters;* and for Charles J. Bether et al. by *Peter J. Gregora*, *James M. Weinberg*, and *Robert L. Winslow.*

Bruce O. Jolly, Jr., filed a brief for the Credit Union National Association, Inc., as *amicus curiae.*

[1] The Board came into being under § 17 of the earlier Federal Home Loan Bank Act, 47 Stat. 736, as amended, 12 U. S. C. § 1437, the statute which created the federal home loan bank system. The three members of the Board are appointed by the President, with the advice and consent of the Senate, for 4-year terms. See note following 12 U. S. C. § 1437. In addition to providing for the establishment of federal savings and loan associations, the HOLA, by its § 3, 48 Stat. 129, repealed § 4(d) of the Federal Home Loan Bank Act, 47 Stat. 727, which had authorized federal home loan banks to make loans directly to homeowners. The HOLA, by its § 4, 48 Stat. 129, instructed the Board to create the Home Owners' Loan Corporation; this agency was to exchange its bonds for mortgages held by financial institutions, including state-chartered savings and loans, and to provide funds to needy homeowners for accrued taxes, maintenance, and repairs.

"under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations.'" Pursuant to this authorization, the Board has promulgated regulations governing "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *People* v. *Coast Federal Sav. & Loan Assn.*, 98 F. Supp. 311, 316 (SD Cal. 1951).

In 1976, the Board became concerned about the increasing controversy as to the authority of a federal savings and loan association to exercise a "due-on-sale" clause—a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred.[2] Specifi-

---

[2] The due-on-sale clause used in many loan instruments is ¶ 17 of the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association. Paragraph 17 appears in two of the deeds of trust at issue in this case and reads:

"17. Transfer of the Property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, *Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable.* Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17 and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Deed of Trust and the Note.

"If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration in accordance with paragraph 14 hereof. Such cally, the Board felt that restrictions on a savings and loan's ability to accelerate a loan upon transfer of the security would have a number of adverse effects: (1) that "the financial security and stability of Federal associations would be endangered if . . . the security property is transferred to a person whose ability to repay the loan and properly maintain the property is inadequate"; (2) that "elimination of the due on sale clause will cause a substantial reduction of the cash flow and net income of Federal associations, and that to offset such losses it is likely that the associations will be forced to charge higher interest rates and loan charges on home loans generally"; and (3) that "elimination of the due on sale clause will restrict and impair the ability of Federal associations to sell their home loans in the secondary mortgage market, by making such loans unsalable or causing them to be sold at reduced prices, thereby reducing the flow of new funds for residential loans, which otherwise would be available." 41 Fed. Reg. 6283, 6285 (1976). The Board concluded that "elimination of the due on sale clause will benefit only a limited number of home sellers, but generally will cause economic hardship to the majority of home buyers and potential home buyers." *Ibid.*

Accordingly, the Board issued a regulation in 1976 governing due-on-sale clauses. The regulation, now 12 CFR § 545.8-3(f) (1982),[3] provides in relevant part:

> "[A federal savings and loan] association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instru-

---

notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by paragraph 18 hereof." App. 50-51, 85-86 (emphasis added).

[3] The due-on-sale regulation was codified initially in 12 CFR § 545.6-11(f) (1980). See 44 Fed. Reg. 39108, 39149 (1979).

> ment whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as [otherwise] provided in . . . this section . . . , exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract."

In the preamble accompanying final publication of the due-on-sale regulation, the Board explained its intent that the due-on-sale practices of federal savings and loans be governed "exclusively by Federal law." 41 Fed. Reg. 18286, 18287 (1976). The Board emphasized that "[f]ederal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements." *Ibid.*[4]

B

Appellant Fidelity Federal Savings and Loan Association (Fidelity) is a private mutual savings and loan association chartered by the Board pursuant to § 5(a) of the HOLA. Fidelity's principal place of business is in Glendale, Cal. Appellees, de la Cuesta, Moore, and Whitcombe, each made a purchase of California real property from one who had borrowed money from Fidelity. As security for the loan, the borrower had given Fidelity a deed of trust on the property. Each deed of trust contained a due-on-sale clause. Two of the deeds also included a provision, identified as ¶15, which stated that the deed "shall be governed by the law of the jurisdiction in which the Property is located." App. 51, 86.[5]

---

[4] Even before adopting the due-on-sale regulation, the Board had interpreted 12 CFR § 545.8–3(a) (1982)—a regulation promulgated in 1948 that requires all loan instruments to "provide for full protection to the Federal association"—as authorizing federal savings and loans to exercise due-on-sale provisions, despite any state law to the contrary, because such clauses help ensure "full protection" to the lender. See the Board's Advisory Opinion, Resolution No. 75–647, in *Schott* v. *Mission Federal Sav. & Loan Assn.* (*Schott* Advisory Opinion), No. Civ–75–366, pp. 13–15 (CD Cal. July 30, 1975), reprinted as Exhibit A to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction.

Fidelity was not notified prior to each appellee's purchase of property; when it did learn of the transfer, it gave notice of its intent to enforce the due-on-sale clause. Fidelity expressed a willingness to consent to the transfer, however, if the appellee agreed to increase the interest rate on the loan secured by the property to the then-prevailing market rate. Each appellee refused to accept this condition; Fidelity then exercised its option to accelerate the loan. When the loan was not paid, Fidelity instituted a nonjudicial foreclosure proceeding.

In response, each appellee filed suit in the Superior Court of California for Orange County. Each asserted that, under the principles announced by the California Supreme Court in *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 582 P. 2d

---

[5] Paragraph 15 is also part of the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association. See n. 2, *supra*. The paragraph reads in full:

"15. Uniform Deed of Trust; Governing Law; Severability. This form of deed of trust combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property. This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Deed of Trust or the Note conflicts with applicable law, such conflicts shall not affect other provisions of this Deed of Trust or the Note which can be given effect without the conflicting provision, and to this end the provisions of the Deed of Trust and the Note are declared to be severable." App. 51–52, 86–87.

970 (1978), Fidelity's exercise of the due-on-sale clause violated California's prohibition of unreasonable restraints on alienation, Cal. Civ. Code Ann. § 711 (West 1982), "unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default." 21 Cal. 3d, at 953, 582 P. 2d, at 977. Each complaint sought (1) a judicial declaration that the due-on-sale clause was not enforceable unless Fidelity first showed that the transfer had harmed its security interest, (2) an injunction against any foreclosure procedures based on the clause, and (3) compensatory and punitive damages. App. 5, 49, 84.[6]

The Superior Court consolidated the three actions and granted appellants' motion for summary judgment. The court explained that "the federal government has totally occupied the subject of regulation of Federal Savings and Loans," and held, therefore, that the decision in *Wellenkamp* "cannot be extended to [federal] savings and loans." App. to Juris. Statement 29a.

The Court of Appeal for the Fourth Appellate District, however, reversed that judgment. In an opinion that adopted substantial portions of a parallel ruling by the Court of Appeal for the First Appellate District, it concluded that the California Supreme Court's opinion in *Wellenkamp* was controlling. 121 Cal. App. 3d 328, 331, 175 Cal. Rptr. 467, 468 (1981), quoting *Panko* v. *Pan American Federal Sav. & Loan Assn.*, 119 Cal. App. 3d 916, 174 Cal. Rptr. 240 (1981), cert. pending, No. 81–922. The court found that Congress had neither expressed an intent to pre-empt state due-on-sale law nor fully occupied the field of federal savings and loan regulation; for example, the court pointed out, federal associations traditionally have been governed by state real property and mortgage law with respect to title, conveyancing, recording, priority of liens, and foreclosure proceedings.

---

[6] Each complaint also included a slander count, alleging that Fidelity had maliciously published false charges that the appellee was in default under the deed of trust. *Id.*, at 9, 54, 89.

The Court of Appeal likewise rejected appellants' contention that the Board's 1976 regulation expressly had pre-empted the *Wellenkamp* doctrine. Although the court recognized that the preamble accompanying 12 CFR § 545.8–3(f) (1982) manifested the Board's intent that its due-on-sale regulation supersede conflicting state law, it refused to "equate the *Board's* expression of intent with the requisite *congressional* intent." 121 Cal. App. 3d, at 339, 175 Cal. Rptr., at 474 (emphasis in original).[7]

Finally, the Court of Appeal found no evidence that federal law impliedly had pre-empted state law, reasoning that California's due-on-sale law was not incompatible with federal law. The *Wellenkamp* doctrine, the court observed, "is a substantive rule of California property and mortgage law," and not a form of "regulation" over federal savings and loans. 121 Cal. App. 3d, at 341, 175 Cal. Rptr., at 474. Moreover, the court noted, the Board's regulation "merely authorizes and does not compel savings and loan associations to include a due-on-sale clause in their loan contracts and to exercise their rights thereunder." *Ibid.*, 175 Cal. Rptr., at 475. The Court of Appeal likewise discovered no conflict between the *Wellenkamp* doctrine and the purposes of the HOLA because both were designed to assist financially distressed homeowners.

The court derived "further support," 121 Cal. App. 3d, at 342, 175 Cal. Rptr., at 475, for its decision from ¶ 15, which was included in two of the deeds of trust and which provided that the deeds would be "governed by the law of the jurisdiction in which the Property is located." See n. 5, *supra*. That language, the court ruled, evinced an unmistakable intent that state law should govern the interpretation, validity, and enforcement of the deeds.[8]

---

[7] In addition, the Court of Appeal noted that two of the three deeds of trust at issue were executed prior to the effective date of § 545.8–3(f). Therefore, the court reasoned, the Board's due-on-sale regulation was not applicable to those loan instruments and could not pre-empt state law with respect to those deeds. See 121 Cal. App. 3d, at 344, 345, 175 Cal. Rptr., at 476–477.

The California Supreme Court denied appellants' petition for review. App. to Juris. Statement 28a.

Because the majority of courts to consider the question have concluded, in contrast to the decision of the Court of Appeal, that the Board's regulations, including § 545.8–3(f), do pre-empt state regulation of federal savings and loans,[9] we noted probable jurisdiction. 455 U. S. 917 (1982).

---

[8] The Court of Appeal refused to ascribe any weight to the absence of ¶ 15 in the third deed of trust at issue here. The court described its earlier discussion of ¶ 15 as

> "not based so much on an agreement between the parties for the application of state law as on the conclusion that the general use of a provision containing such language by federal savings and loan associations with the approval of the Board persuasively evidences a recognition by the Board and federal savings and loan associations that state law would govern the interpretation, validity and enforcement of security instruments." *Id.*, at 346, 175 Cal. Rptr., at 477.

Nor did the court find significant the fact that this deed covered commercial rather than residential property.

[9] A number of Federal District Courts have concluded that the Board's due-on-sale regulation pre-empts state law. See, *e. g.*, *Price* v. *Florida Federal Sav. & Loan Assn.*, 524 F. Supp. 175, 178 (MD Fla. 1981) (§ 545.8–3(f) is pre-emptive of any state regulation); *First Federal Sav. & Loan Assn.* v. *Peterson*, 516 F. Supp. 732, 740 (ND Fla. 1981) (§ 545.8–3(f) pre-empts Florida due-on-sale restrictions similar to those imposed by California); *Dantus* v. *First Federal Sav. & Loan Assn.*, 502 F. Supp. 658, 661 (Colo. 1980) (analogous ruling with respect to Colorado law); *Bailey* v. *First Federal Sav. & Loan Assn.*, 467 F. Supp. 1139, 1141 (CD Ill. 1979) (§ 545.8–3(f) forecloses any state regulation of due-on-sale practices of federal savings and loans), appeal dism'd, 636 F. 2d 1221 (CA7 1980); *Glendale Federal Sav. & Loan Assn.* v. *Fox*, 459 F. Supp. 903, 907 (CD Cal. 1978) (same), final summary judgment granted, 481 F. Supp. 616 (1979), order reversing and remanding, 663 F. 2d 1078 (CA9 1981), cert. pending, No. 81–1192. One court appears to have agreed with the California Court of Appeal. See *Holiday Acres No. 3* v. *Midwest Federal Sav. & Loan Assn.*,

II

The pre-emption doctrine, which has its roots in the Supremacy Clause, U. S. Const., Art. VI, cl. 2, requires us to examine congressional intent. Pre-emption may be either

---

308 N. W. 2d 471 (Minn. 1981) (§ 545.8–3(f) does not pre-empt state regulation of due-on-sale clauses).

In addition, at least three Federal Courts of Appeals, several District Courts, and one State Supreme Court have ruled that various other Board regulations supersede state law. See, *e. g.*, *Conference of Federal Sav. & Loan Assns.* v. *Stein*, 604 F. 2d 1256, 1260 (CA9 1979) ("In our judgment the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control"), summarily aff'd, 445 U. S. 921 (1980); *First Federal Sav. & Loan Assn.* v. *Greenwald*, 591 F. 2d 417, 425–426 (CA1 1979) (Board regulation specifying the conditions under which federal savings and loans must pay interest on escrow accounts pre-empts state law imposing greater interest requirements); *Kupiec* v. *Republic Federal Sav. & Loan Assn.*, 512 F. 2d 147, 150–152 (CA7 1975) (Board regulation supersedes any common-law right to inspect savings and loan's membership list); *Meyers* v. *Beverly Hills Federal Sav. & Loan Assn.*, 499 F. 2d 1145, 1147 (CA9 1974) (Board regulation pre-empts the field of prepayments of real estate loans to federal associations); *Rettig* v. *Arlington Heights Federal Sav. & Loan Assn.*, 405 F. Supp. 819 (ND Ill. 1975) (Board regulations and policy statements preempt the field of fiduciary duties of federal savings and loan officers); *Lyons Sav. & Loan Assn.* v. *Federal Home Loan Bank Bd.*, 377 F. Supp. 11 (ND Ill. 1974) (Board regulation displaces state law regarding branching of federal savings and loans); *People* v. *Coast Federal Sav. & Loan Assn.*, 98 F. Supp. 311, 318 (SD Cal. 1951) (federal regulation of savings and loans pre-empts the field); *Kaski* v. *First Federal Sav. & Loan Assn.*, 72 Wis. 2d 132, 141–142, 240 N. W. 2d 367, 373 (1976) (federal law supersedes state regulation of federal savings and loans' lending practices). But see *Derenco, Inc.* v. *Benjamin Franklin Federal Sav. & Loan Assn.*, 281 Ore. 533, 577 P. 2d 477 (Board regulation authorizing federal savings and loans to maintain reserve accounts for tax and insurance payments does not occupy the field of reserve accounts or pre-empt state law requiring payment of interest on such accounts), cert. denied, 439 U. S. 1051 (1978). Cf. *Gulf Federal Sav. & Loan Assn.* v. *Federal Home Loan Bank Bd.*, 651 F. 2d 259, 266 (CA5 1981) (Board has authority only over internal management of federal savings and loans, and not over disputed loan agreement provisions), cert. pending, No. 81–1744.

express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). See also *Jones* v. *Rath Packing Co.*, 430 U. S., at 526; *Bethlehem Steel Co.* v. *New York Labor Relations Bd.*, 330 U. S. 767, 773 (1947). These principles are not inapplicable here simply because real property law is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U. S. 663, 666 (1962); see also *Ridgway* v. *Ridgway*, 454 U. S. 46, 54–55 (1981).

Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. *United States* v. *Shimer*, 367 U. S. 374, 381–382 (1961). When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited:

> "If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.*, at 383.

See also *Blum* v. *Bacon*, 457 U. S. 132, 145–146 (1982); *Ridgway* v. *Ridgway*, 454 U. S., at 57 (regulations must not be "unreasonable, unauthorized, or inconsistent with" the underlying statute); *Free* v. *Bland*, 369 U. S., at 668.

A pre-emptive regulation's force does not depend on express congressional authorization to displace state law; moreover, whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive. See *United States* v. *Shimer*, 367 U. S., at 381–383. Thus, the Court of Appeal's narrow focus on Congress' intent to supersede state law was misdirected. Rather, the questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority.

III

As even the Court of Appeal recognized, the Board's intent to pre-empt the *Wellenkamp* doctrine is unambiguous. The due-on-sale regulation plainly provides that a federal savings and loan "continues to have the power" to include a due-on-sale clause in a loan instrument and to enforce that clause "at its option." 12 CFR § 545.8–3(f) (1982). The California courts, in contrast, have limited a federal association's right to exercise a due-on-sale provision to those cases where the lender can demonstrate that the transfer has impaired its security.

The conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. The Board consciously has chosen not to mandate use of due-on-sale clauses "because [it] desires to afford associations the flexibility to accommodate special situations and circumstances." 12 CFR § 556.9(f)(1) (1982).[10] Although compliance with both § 545.8–3(f) and the *Wellenkamp* rule may not be "a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S., at 142–143, the California courts have forbidden a federal savings and loan to enforce a due-on-sale clause solely "at its option" and have deprived the lender of the "flexibility" given it by the Board.

Moreover, the Board recently has "reiterat[ed] its longstanding policy" of authorizing federal savings and loan associations to enforce due-on-sale clauses "subject only to express limitations imposed by the Board." 46 Fed. Reg. 39123, 39124 (1981). The only restrictions specified in the Board's regulation are contained in 12 CFR § 545.8–3(g) (1982).[11] That provision, unlike the *Wellenkamp* doctrine, does not confine a federal association's right to accelerate a loan to cases where the lender's security is impaired. In addition, *Wellenkamp* explicitly bars a federal savings and loan from exercising a due-on-sale clause to adjust a long-term mortgage's interest rate towards current market rates—a due-on-sale practice the Board has approved and views as critical to "the financial stability of the association." See *Schott* Advisory Opinion, at 27.

---

[10] As a practical matter, however, few mortgage instruments are written without due-on-sale clauses. The Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, which purchase the bulk of mortgages sold in the secondary mortgage market, both require, in the mortgages they buy, either a due-on-sale clause or a provision enabling the lender to demand payment of the loan in seven years. The marketability of a mortgage in the secondary market is critical to a savings and loan, for it thereby can sell mortgages to obtain funds to make additional home loans. See *Schott* Advisory Opinion, at 28–34; Kinzler, Due-on-Sale Clauses: The Economic and Legal Issues, 43 U. Pitt. L. Rev. 441, 452–453 (1982); Comment, 9 Fla. State L. Rev. 645, 646, 650 (1981).

[11] Title 12 CFR § 545.8–3(g) (1982), which applies to loans made after July 31, 1976, and secured by a home occupied or to be occupied by the borrower, prohibits the exercise of a due-on-sale clause in the same four

By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created "an obstacle to the accomplishment and execution of the full purposes and objectives" of the due-on-sale regulation. *Hines* v. *Davidowitz*, 312 U. S., at 67. Cf. *Franklin Nat. Bank* v. *New York*, 347 U. S. 373, 378 (1954) (finding a "clear conflict" between federal law, which authorized national banks to receive savings deposits but did not specifically permit—much less require—advertising by such banks, and New York law, which forbade them to use the word "savings" in their advertising or business).

Contending that the *Wellenkamp* doctrine is not inconsistent with the due-on-sale regulation, however, appellees point to the regulation's second sentence, which provides in pertinent part:

> "[E]xercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and rem-

---

circumstances listed in ¶17 of the uniform mortgage instrument, see n. 2, *supra:* when a lien subordinate to the lender's security instrument is created; when a purchase money security interest for household appliances is created; when a transfer occurs by devise, descent, or operation of law on the death of a joint tenant; or when a leasehold interest of not more than three years is granted with no option to purchase. Section 545.8-3(g) also bars the association from imposing a prepayment penalty when a loan is accelerated by means of a due-on-sale clause, and provides that, under specified circumstances, the lender waives its option to exercise a due-on-sale provision.

> edies of the association and borrower shall be fixed and governed by that contract." 12 CFR § 545.8–3(f) (1982).

Appellees interpret this language as incorporating state contract law—and therefore any state law restricting the exercise of a due-on-sale clause. We note, however, that the incorporation of state law does not signify the inapplicability of federal law, for "a fundamental principle in our system of complex national polity" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Hauenstein* v. *Lynham*, 100 U. S. 483, 490 (1880). See also *Testa* v. *Katt*, 330 U. S. 386, 390–392 (1947).[12] Moreover, in our view, the second sentence of § 545.8–3(f) simply makes clear that the regulation does not empower federal savings and loans to accelerate a loan upon transfer of the security property unless the parties to the particular loan instrument, as a matter of contract, have given the lender that right. Similarly, if the parties to a given contract agree somehow to limit the association's right to exercise a due-on-sale provision, the second sentence of § 545.8–3(f) precludes the lender from relying on the first sentence as authorizing more expansive use of the clause.

---

[12] This principle likewise leads us to reject appellees' contention that, with respect to the two deeds of trust containing ¶ 15, see n. 5, *supra*, appellants did in fact agree to be bound by local law. Paragraph 15 provides that the deed is to be governed by the "law of the jurisdiction" in which the property is located; but the "law of the jurisdiction" includes federal as well as state law.

Moreover, like ¶ 17—the due-on-sale clause in the uniform mortgage instrument, see n. 2, *supra*—¶ 15 typically must be included in any mortgage the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association purchases in the secondary mortgage market. See n. 10, *supra*. Paragraph 15 was added to the uniform mortgage instrument not to elevate state law over federal law, but to provide a uniform choice-of-law provision to be used when interstate disputes arose regarding the interpretation of a mortgage. See App. to Brief for Federal Home Loan Bank Board and Federal Home Loan Mortgage Corporation as *Amici Curiae* 2a (letter from Henry L. Judy, General Counsel, Federal Home Loan Mortgage Corporation); see also S. Rep. No. 91–761, p. 25 (1970) (letter from Arthur F. Burns, Chairman of the Board of Governors, Federal Reserve System).

Any ambiguity in § 545.8–3(f)'s language is dispelled by the preamble accompanying and explaining the regulation. The preamble unequivocally expresses the Board's determination to displace state law:

> "Finally, it was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed *exclusively* by Federal law. Therefore, . . . exercise of due-on-sale clauses by Federal associations shall be governed and controlled *solely* by [§ 545.8–3] and the Board's new Statement of Policy. *Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements*, nor shall Federal associations attempt to . . . avoid the limitations on the exercise of due-on-sale clauses delineated in [§ 545.8–3(g)] on the ground that such . . . avoidance of limitations is permissible under State law." 41 Fed. Reg. 18286, 18287 (1976) (emphasis added).[13]

In addition, the Board recently has "confirm[ed]" that the due-on-sale practices of federal savings and loans "shall be governed exclusively by the Board's regulations in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise." 12 CFR

---

[13] Citing *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 315–316 (1979), appellees characterize the preamble as an interpretative regulation that does not have the binding force of law and therefore cannot pre-empt state law. But *Chrysler Corp.* is not on point because we conclude that § 545.8–3(f) itself supersedes contrary state due-on-sale law; we look to the preamble only for the administrative construction of the regulation, to which "deference is . . . clearly in order." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). We need not consider, therefore, the pre-emptive effect of the preamble standing alone.

§ 556.9(f)(2) (1982). Thus, we conclude that the Board's due-on-sale regulation was meant to pre-empt conflicting state limitations on the due-on-sale practices of federal savings and loans, and that the California Supreme Court's decision in *Wellenkamp* creates such a conflict.[14]

IV

The question remains whether the Board acted within its statutory authority in issuing the pre-emptive due-on-sale regulation. The language and history of the HOLA convince us that Congress delegated to the Board ample authority to regulate the lending practices of federal savings and loans so as to further the Act's purposes, and that § 545.8–3(f) is consistent with those purposes.

A

The HOLA, a product of the Great Depression of the 1930's, was intended "to provide emergency relief with respect to home mortgage indebtedness" at a time when as many as half of all home loans in the country were in default. H. R. Conf. Rep. No. 210, 73d Cong., 1st Sess., 1 (1933). See 77 Cong. Rec. 2499 (1933) (remarks of Rep. Hancock); *id.*, at 2570 (remarks of Rep. Reilly); Home Owners' Loan Act: Hearings on S. 1317 before a Subcommittee of the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 9 (1933) (Senate Hearings) (statement of Horace Russell, one of the drafters of the bill and General Counsel, Federal Home Loan Bank Board, Atlanta, Ga.). Local institutions that had previously supplied funds to finance homes had ceased doing business or had discontinued such long-term loans, so that more than half the counties in the country, containing almost one-fifth of the total population, were without home-financing institutions. See *id.*, at 7, 19; see also H. R. Rep. No. 55, 73d Cong., 1st Sess., 2 (1933); S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); Home Owners' Loan Act: Hearings on H. R. 4980 before the House Committee on Banking and Currency, 73d Cong., 1st Sess., 16–17 (1933) (House Hearings) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board); Comment, 11 Pac. L. J. 1085, 1103 (1980) (by 1933, 1,700 state-chartered savings and loans had failed, causing losses of some $200 million, about one-third the value of savings in these associations).

---

[14] Because we find an actual conflict between federal and state law, we need not decide whether the HOLA or the Board's regulations occupy the field of due-on-sale law or the entire field of federal savings and loan regulation.

In order to ameliorate these conditions, Congress enacted the HOLA, "a radical and comprehensive response to the inadequacies of the existing state systems." *Conference of Federal Sav. & Loan Assns.* v. *Stein*, 604 F. 2d 1256, 1257 (CA9 1979), summarily aff'd, 445 U. S. 921 (1980). The Act provided for the creation of a system of federal savings and loan associations, which would be regulated by the Board so as to ensure their vitality as "permanent associations to promote the thrift of the people in a cooperative manner, to finance their homes and the homes of their neighbors." S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); see also H. R. Rep. No. 55, 73d Cong., 1st Sess., 2 (1933); 77 Cong. Rec. 4974 (1933) (remarks of Sen. Bulkley).

Thus, in § 5(a) of the Act, Congress gave the Board plenary authority to issue regulations governing federal savings and loans:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, *operation*, and *regulation* of associations to be known as 'Federal Savings and Loan Associations', or 'Federal mutual savings banks' . . . , and to issue charters there-

> for, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." 12 U. S. C. § 1464(a)(1) (1976 ed., Supp. IV) (emphasis added).

The broad language of § 5(a) expresses no limits on the Board's authority to regulate the lending practices of federal savings and loans. As one court put it, "[i]t would have been difficult for Congress to give the Bank Board a broader mandate." *Glendale Federal Sav. & Loan Assn.* v. *Fox*, 459 F. Supp. 903, 910 (CD Cal. 1978), final summary judgment granted, 481 F. Supp. 616 (1979), order reversing and remanding, 663 F. 2d 1078 (CA9 1981), cert. pending, No. 81–1192. And Congress' explicit delegation of jurisdiction over the "operation" of these institutions must empower the Board to issue regulations governing mortgage loan instruments, for mortgages are a central part of any savings and loan's "operation." See *Schott* Advisory Opinion, at 21; House Hearings 16 (Apr. 20, 1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board) ("We are loaning [savings associations] seven million dollars a week and they are lending it pretty largely on homes of the type contemplated in the Act"); Tr. of Oral Arg. 4 (approximately 78% of savings and loan associations' assets are invested in mortgage loan contracts).

Moreover, Congress directed that, in regulating federal savings and loans, the Board consider "the best practices of local mutual thrift and home-financing institutions in the United States," which were at that time all state-chartered. § 5(a) of the HOLA, 12 U. S. C. § 1464(a). By so stating, Congress plainly envisioned that federal savings and loans would be governed by what the Board—not any particular State—deemed to be the "best practices." See also *First Federal Sav. & Loan Assn.* v. *Massachusetts Tax Comm'n*, 437 U. S. 255, 258, n. 3 (1978) (observing that the HOLA "protects federal associations from being forced into the state regulatory mold"). Thus, the statutory language suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law.

Appellees, however, point to the various sections of the HOLA explicitly pre-empting[15] and incorporating[16] state law, and contend that the Board has no additional authority to adopt regulations displacing state law. Although Congress made decisions about the applicability of certain aspects of state law to federal savings and loans, these provisions do not imply that Congress intended no further pre-emption of state law. Rather, Congress invested the Board with broad authority to regulate federal savings and loans so as to effect the statute's purposes, and plainly indicated that the Board need not feel bound by existing state law. § 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV). We cannot read this broad delegation of power as confining the Board's authority to pre-empt state law to those areas "specifically described by the Act's other provisions." *United*

---

[15] See § 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV) (exempting federal mutual savings banks formerly organized under state law from "any numerical limitations of State law on the establishment of branch offices and other facilities"); and § 5(h) of the Act, § 1464(h) (pre-empting state taxes on federal savings and loans greater than those imposed on "other similar local mutual or cooperative thrift and home financing institutions"). Cf. § 13 of the Federal Home Loan Bank Act, 12 U. S. C. § 1433 (exempting Federal Home Loan Bank bonds from taxation).

[16] See § 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV) (providing that any federal mutual savings bank which was formerly a state-chartered institution is subject to state laws pertaining to discrimination in lending based on neighborhood or geographic area, and to requirements imposed under the Consumer Credit Protection Act, 15 U. S. C. § 1601 *et seq.*); § 5(b)(3) of the Act, § 1464(b)(3) (1976 ed., Supp. IV) (authorizing federal savings and loans to borrow funds from a state mortgage finance agency "to the same extent as" state law permits state-chartered savings and loans to do so); and § 5(c)(4)(A) of the Act, § 1464(c)(4)(A) (1976 ed., Supp. IV) (permitting federal associations to invest in, or lend to, any business development credit corporation incorporated in the State "to the same extent as" state-chartered savings and loans are authorized to do so).

States v. *Southwestern Cable Co.*, 392 U. S. 157, 172 (1968); see also *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 193–194 (1941).

Furthermore, if federal savings and loans were expected to conform to state law except where explicitly pre-empted in the Act itself, the provisions incorporating specific aspects of state law were needlessly repetitive. We decline to construe the Act so as to render these provisions nugatory, "thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect." *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 513 (1981). See also *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307–308 (1961); cf. *Franklin Nat. Bank* v. *New York*, 347 U. S., at 378 ("We find no indication that Congress intended to make this phase of national banking [*i. e.*, advertising] subject to local restrictions, as it has done by express language in several other instances").[17]

B

Because of the exigencies of the times, the HOLA was enacted hurriedly and its legislative history, concededly, is somewhat sparse.[18] But that history does confirm our reading of the statutory language and the Board's plenary authority to regulate the operations of federal savings and loans. Attempting to provide for the "relief of the man who is about to lose his home," Congress set out the general framework and left many of the details to the Board. House Hearings 13 (Apr. 20, 1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board). Thus, references to the Board's broad discretion to regulate the newly created federal savings and loans appear throughout the legislative history. Nowhere is there a suggestion of any intent somehow to limit the Board's authority.

---

[17] Likewise, we find nothing in § 8 of the Federal Home Loan Bank Act of 1932, 12 U. S. C. § 1428, relied on by the dissent, see *post*, at 173, that suggests any limit on the Board's authority to issue regulations preempting state law. That provision, which is not even part of the HOLA, speaks only to the Board's authority to examine state laws governing the operation of federal home loan banks, not federal savings and loans, for the purpose of ensuring "[a]dequate protection to a Federal Home Loan Bank in making or collecting advances under th[at] chapter . . . ." 12 U. S. C. § 1428. It does not purport to constrict the Board's power to regulate the operations of federal savings and loans and does not negate the explicit language and history of the HOLA.

[18] On April 13, 1933, President F. D. Roosevelt wrote Congress, asking for "legislation to protect small home owners from foreclosure and to relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power." H. R. Doc. No. 19, 73d Cong., 1st Sess., 1 (1933). Hearings were held by the House Committee on Banking and Currency on April 20

Chairman Stevenson's testimony during the HOLA hearings suggests that the Act contemplated that federal law would govern the terms of the loan instruments used by federal savings and loans. Discussing § 5(c) of the HOLA, as amended, 12 U. S. C. § 1464(c), Representative Hancock noted: "You are departing from uniformity with respect to loan associations throughout the United States when you say that the thrift associations cannot loan on a piece of real estate in excess of $20,000." House Hearings 14 (Apr. 21, 1933). The Chairman replied: "That may be true. We are departing in a good many ways. We have a good many [thrift associations] that are in dire straits because they have loaned on property way up yonder in value, and they have their money tied up in hotels, apartment houses and things of that kind, which puts them in a desperate situation." *Ibid.*

Similarly, in response to concern expressed during the Senate hearings that the Act did not prohibit borrowers from obtaining financing and then renting the property, Chairman Stevenson observed: "That would be a matter of regulation. That could be covered by regulation under the bill." Senate

---

and 21, 1933, and by the Senate Committee on Banking and Currency on April 20 and 22. The bill was approved by the House on April 28, see 77 Cong. Rec. 2585, and passed the Senate on June 5, see *id.*, at 4995. The President signed the bill into law on June 9, 1933, see *id.*, at 6198, less than two months after he had first requested the legislation.

Hearings 14. Asked whether the Board would have authority to promulgate such a regulation, Stevenson replied:

> "If the Federal Home Loan Bank Board should choose to make that kind of a regulation it could put that in. A great many of these local private institutions would put that kind of a clause in their loans." *Ibid.*

See also House Hearings 5 (Apr. 20, 1933) (statement of Chairman Stevenson) (referring to "the regulations as to the use of the property after the loan is once obtained"); *id.*, at 9 (Apr. 21, 1933) (statement of Mr. Stevenson) ("[I]t is in the discretion of the Board when it will grant [a 3-year] extension [of loan payments]"); *id.*, at 18–19 (colloquy between Mr. Stevenson and Rep. Reilly) (noting that the Board has discretion in determining whether to charter a federal association).

The subsequent debates confirm that Congress accepted Chairman Stevenson's offer and furnished the Board with broad power to regulate the federal savings and loans. Thus, Representative Luce, ranking minority member of the House Committee on Banking and Currency, observed that the federal savings and loan associations "will be formed in accordance with the best building-and-loan practice, and I feel sure we may rely upon [Chairman Stevenson] and his Board to carry out that promise." 77 Cong. Rec. 2480 (1933). "It is contemplated by the bill before us to put the machinery in the hands of the Home Loan Bank Board," and "[w]e give the board great power to administer the act," Representative Luce continued. *Id.*, at 2480, 2481. See also *id.*, at 2481 ("We leave such things [as limitations on conversion of federal home loan banks to federal savings and loans] to the judgment of the board"); *id.*, at 2501 ("The prudent course is to leave this to the judgment of the board, by imposing a maximum [rate of interest] in the bill—4 percent upon what we borrow, 5 percent upon what we lend—and trust this Board . . . to get lower rates for borrowing or make lower rates for lending as the opportunity may come"); *id.*, at 4987 (colloquy between Sens. Hebert and Bulkley) (observing that the Board has discretion in determining when savings and loans should be chartered in areas with existing local thrift institutions).

Thus, the HOLA did not simply incorporate existing local loan practices. Rather, Congress delegated to the Board broad authority to establish and regulate "a uniform system of [savings and loan] institutions where there are not any now," and to "establish them with the force of the government behind them, with a national charter." House Hearings 15 (Apr. 21, 1933) (statement of Chairman Stevenson); *id.*, at 17 (Apr. 20, 1933).[19] And the Board has exercised

---

[19] The postenactment history of the HOLA corroborates the Board's broad authority to regulate the lending practices of federal savings and loans. As part of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630, 92 Stat. 3641, Congress amended § 5(a) of the HOLA to permit state mutual savings banks to obtain federal charters. During debate in the House, Representative Hanley introduced an amendment providing that those mutual savings banks opting to convert to federally chartered institutions would continue to be subject to state law pertaining to lending discrimination and to regulations imposed under the Consumer Credit Protection Act, 82 Stat. 146, as amended, 15 U. S. C. § 1601 *et seq.*, if the Board determined that state law imposed more stringent requirements than federal law. See 124 Cong. Rec. 33847 (1978).

Representative Hanley explained: "In no way, of course, would the use of State law requirements for Federal mutual savings banks be interpreted to erode the Bank Board's long-standing plenary authority over Federal savings and loan associations; Federal law alone would continue to govern these institutions in such areas as branching, anti-discrimination, and lending authority." *Id.*, at 33848. Representative St Germain, chairman of the Subcommittee on Financial Institutions Supervision, Regulation, and Insurance of the House Committee on Banking, Finance, and Urban Affairs and chief sponsor of the bill, agreed: "This restriction applies only to converted mutual savings banks, and Congress in no way intends to interfere with the longstanding, all-inclusive power of the Bank Board over the activities of Federal savings and loan associations, including branching authority." *Id.*, at 33849. The amendment was agreed to. *Ibid.*

Similar views were expressed during the Senate debate on the bill. Senator Brooke observed that "we do not intend to interfere with the Bank that discretion, regulating comprehensively the operations of these associations, including their lending practices and, specifically, the terms of loan instruments.[20]

C

As we noted above, a savings and loan's mortgage lending practices are a critical aspect of its "operation," over which the Board unquestionably has jurisdiction. Although the Board's power to promulgate regulations exempting federal savings and loans from the requirements of state law may not be boundless, in this case we need not explore the outer limits of the Board's discretion. We have no difficulty concluding that the due-on-sale regulation is within the scope of the Board's authority under the HOLA and consistent with the Act's principal purposes.

Board's plenary authority over Federal savings and loan associations, and in this area, Federal law alone would continue to govern." *Id.*, at 36148.

Then, during debate in the House on the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96–221, 94 Stat. 132, one Congressman expressed concern that permitting federal savings and loans to make residential real estate loans to the same extent national banking associations were authorized to do so might be interpreted as making "federal savings and loans . . . subject to State requirements." 126 Cong. Rec. 6981 (1980) (remarks of Rep. Patterson). Representative St Germain responded that the Act would expand the federal associations' investment powers "[o]nly if the Federal Home Loan Bank Board permits. Under the Home Owners' Act, the Bank Board has complete authority to determine by regulation the lending practices of Federal associations." *Ibid.*

Although these postenactment events cannot be accorded the weight of contemporary history, they do provide further confirmation of Congress' intent to delegate to the Board broad discretion in regulating the lending practices of federal savings and loans. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969).

[20] The Board's extensive regulations govern, for example, fair credit requirements, the types and amount of loans, collateral required, repayment schedules, initial loan charges, assignment of rents, escrow accounts and interest paid on those accounts, late charges, servicing of loans, and loan payments and prepayments. See 12 CFR §§ 545.6, 545.8 (1982).

Congress delegated power to the Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase. Thus, in testifying during the House hearings on the HOLA, the Board's Chairman observed: "The new corporations that we propose to set up, we want them set up on a sound basis as they will be of very material assistance in home financing for all time, if properly managed." House Hearings 12 (Apr. 21, 1933). And the relevant House and Senate Reports referred to the federal associations as "permanent" institutions. S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); H. R. Rep. No. 55, 73d Cong., 1st Sess., 2 (1933).

The due-on-sale regulation was promulgated with these purposes in mind. The Board has determined that due-on-sale clauses are "a valuable and often an indispensable source of protection for the financial soundness of Federal associations and for their continued ability to fund new home loan commitments." 12 CFR § 556.9(f)(1) (1982). Specifically, the Board has concluded that the due-on-sale clause is "an important part of the mortgage contract" and that its elimination "will have an adverse [e]ffect on the earning power and financial stability of Federal associations, will impair the ability of Federal associations to sell their loans in the secondary markets, will reduce the amount of home-financing funds available to potential home buyers, and generally will cause a rise in home loan interest rates." *Schott* Advisory Opinion, at 2, 17–18.

The Board's analysis proceeds as follows: It observes that the federal associations' practice of borrowing short and lending long—obtaining funds on a short-term basis and investing them in long-term real estate loans, which typically have a 25- to 30-year term—combined with rising interest rates, has increased the cost of funds to these institutions and reduced their income. Exercising due-on-sale clauses enables savings and loans to alleviate this problem by replacing long-term, low-yield loans with loans at the prevailing interest rates and thereby to avoid increasing interest rates across the board. See *id.*, at 21–22. Moreover, the Board has determined that restrictions like the *Wellenkamp* doctrine lengthen the expected maturity date of a lender's mortgages, thus reducing their marketability in the secondary mortgage market. As a result, the Board fears, "the financial stability of Federal associations in California will be eroded and the flow of home loan funds into California will be reduced." *Schott* Advisory Opinion, at 34.[21]

Admittedly, the wisdom of the Board's policy decision is not uncontroverted.[22] But neither is it arbitrary or capricious. As judges, it is neither our function, nor within our expertise, to evaluate the economic soundness of the Board's approach. In promulgating the due-on-sale regulation, the Board reasonably exercised the authority, given it by Congress, so as to ensure the financial stability of "local mutual thrift institutions in which people . . . invest their funds and . . . [which] provide for the financing of homes." § 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV).[23] By so doing, the Board intended to pre-empt conflicting state restrictions on due-on-sale practices like the California Supreme Court's *Wellenkamp* doctrine.

---

[21] The Board's Due-on-Sale Task Force estimates that the California Supreme Court's restrictions on the exercise of due-on-sale clauses accounted for 40% of the total losses suffered in 1981 by state-chartered associations in the State—some $200 million. See Federal Home Loan Bank Board, Due-on-Sale Task Force Report 2, 15 (1982). The Task Force projects that imposition of such restrictions nationwide would create, within two years, annual losses of $600 to $800 million for federal savings and loans, and $1 to $1.3 billion for all federal and state associations. See *id.*, at 2, 18, 25.

[22] Those subscribing to the opposite view contend that the unrestricted exercise of due-on-sale clauses may preclude the assumption of mortgages at lower interest rates, thus preventing the sale of homes and transferring the burden of an inflationary market from the lender to the homeowner and prospective homeowner. See, *e. g.*, *Patton* v. *First Federal Sav. & Loan Assn.*, 118 Ariz. 473, 578 P. 2d 152 (1978); *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 582 P. 2d 970 (1978); *Nichols* v. *Ann Arbor Federal Sav. & Loan Assn.*, 73 Mich. App. 163, 250 N. W. 2d 804 (1977).

A number of courts, however, have agreed with the Board's approach. See, *e. g.*, *Williams* v. *First Federal Sav. & Loan Assn.*, 651 F. 2d 910 (CA4 1981); *Tierce* v. *APS Co.*, 382 So. 2d 485 (Ala. 1979); *Malouff* v. *Midland Federal Sav. & Loan Assn.*, 181 Colo. 294, 509 P. 2d 1240 (1973); *Martin* v. *Peoples Mutual Sav. & Loan Assn.*, 319 N. W. 2d 220 (Iowa 1982); *Occidental Savings & Loan Assn.* v. *Venco Partnership*, 206 Neb. 469, 293 N. W. 2d 843 (1980); *Crockett* v. *First Federal Sav. & Loan Assn.*, 289 N. C. 620, 224 S. E. 2d 580 (1976); *Gunther* v. *White*, 489 S. W. 2d 529 (Tenn. 1973).

Our inquiry ends there. Accordingly, we hold that the Board's due-on-sale regulation bars application of the *Wellenkamp* rule to federal savings and loan associations.[24] The judgment of the Court of Appeal is reversed.

It is so ordered.

---

[23] We therefore reject appellees' contention that the Board's power to regulate federal savings and loans extends only to the associations' internal management and not to any external matters, such as their relationship with borrowers. Although one federal and one state court have drawn this distinction, see *Gulf Federal Sav. & Loan Assn.* v. *Federal Home Loan Bank Bd.*, 651 F. 2d, at 266; *Holiday Acres No. 3* v. *Midwest Federal Sav. & Loan Assn.*, 308 N. W. 2d, at 478, we find no support in the language of the HOLA or its legislative history for such a restriction on the Board's authority.

Moreover, whatever validity the distinction has in theory, it makes little sense here. As the Wisconsin Supreme Court recognized, "[t]he regulation of loan practices directly affects the internal management and operations of federal associations and therefore requires uniform federal control." *Kaski* v. *First Federal Sav. & Loan Assn.*, 72 Wis. 2d, at 142, 240 N. W. 2d, at 373. In fact, as discussed in the text, the Board's due-on-sale policy is based on the view that due-on-sale clauses are essential to the financial soundness of federal savings and loans; preservation of the associations' very existence is obviously related to their internal management and is one of the functions delegated to the Board by Congress.

[24] Pointing out that two of the deeds of trust were executed prior to the 1976 effective date of § 545.8-3(f), appellees argue that the due-on-sale regulation may not be applied so as to destroy vested rights. Therefore, appellees reason, California law does not conflict with federal law with respect to those two deeds. Appellants respond that § 545.8-3(f) did not in-

JUSTICE POWELL took no part in the consideration or decision of this case.

JUSTICE O'CONNOR, concurring.

I join in the Court's opinion but write separately to emphasize that the authority of the Federal Home Loan Bank Board to pre-empt state laws is not limitless.* Although Congress delegated broad power to the Board to ensure that federally chartered savings and loan institutions "would re-

---

terfere with appellees' rights because it merely codified pre-existing law. See n. 4, *supra*.

When the two deeds of trust were executed in 1971 and 1972, California law permitted the unrestricted exercise of due-on-sale clauses upon outright transfer of the security property, as occurred here. The Board's due-on-sale regulation was then issued in 1976, reinforcing Fidelity's right to enforce the due-on-sale provisions. Not until *Wellenkamp* was decided in 1978 was a lender's right under California law to accelerate a loan in response to an outright transfer limited to cases where the security was impaired. The California Supreme Court's prior cases, which forbade the automatic enforcement of due-on-sale provisions when the borrower further encumbered the property securing the loan, *La Sala* v. *American Savings & Loan Assn.*, 5 Cal. 3d 864, 489 P. 2d 1113 (1971), and when the borrower entered into an installment land contract covering all or part of the security property, *Tucker* v. *Lassen Savings & Loan Assn.*, 12 Cal. 3d 629, 526 P. 2d 1169 (1974), permitted the unrestricted exercise of due-on-sale clauses in cases of outright transfers of the security. See 5 Cal. 3d, at 880, 489 P. 2d, at 1123; 12 Cal. 3d, at 637–638, 526 P. 2d, at 1174–1175.

Because we find the *Wellenkamp* doctrine pre-empted by a previously promulgated federal regulation and therefore inapplicable to federal savings and loans, appellees are deprived of no vested rights if Fidelity is permitted to enforce the due-on-sale clauses in the two pre-1976 deeds: the savings and loan had the right to accelerate the loans, pursuant to California law, when the deeds were executed, and that power was never diminished by state law. We have no occasion, therefore, to consider whether § 545.8–3(f) may be applied so as to give a savings and loan broader authority to enforce a due-on-sale clause than it had when the deed of trust was executed, or to address appellants' contention that § 545.8–3(f) effected no change in the law.

*At one point in today's opinion, the Court states that "we need not decide whether the HOLA or the Board's regulations occupy . . . the entire field of federal savings and loan regulation." *Ante*, at 159, n. 14.

main financially sound," *ante*, at 168, it is clear that HOLA does not permit the Board to pre-empt the application of all state and local laws to such institutions. Nothing in the language of § 5(a) of HOLA, which empowers the Board to "provide for the organization, incorporation, examination, operation, and regulation" of federally chartered savings and loans, remotely suggests that Congress intended to permit the Board to displace local laws, such as tax statutes and zoning ordinances, not directly related to savings and loan practices. Accordingly, in my view, nothing in the Court's opinion should be read to the contrary.

JUSTICE REHNQUIST, with whom JUSTICE STEVENS joins, dissenting.

The Court today concludes that in § 5(a) of the Home Owners' Loan Act of 1933 (HOLA), 12 U. S. C. § 1464(a) (1976 ed., Supp. IV), Congress authorized the Federal Home Loan Bank Board to pre-empt by administrative fiat California's limitations upon the enforceability of "due-on-sale" clauses in real estate mortgages held by federal savings and loan institutions. The Court reaches this extraordinary result by concluding that due-on-sale clauses relate to a savings and loan's mortgage lending practices which "are a critical aspect of its 'operation' over which the Board unquestionably has jurisdiction." *Ante*, at 167. Because I conclude that Congress has not authorized the Board to promulgate a regulation such as 12 CFR § 545.8-3(f) (1982), I dissent.

Section 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV), unquestionably grants broad authority to the Board to regulate the mortgage lending practices of federal savings and loans. In order to perform this role, the Board may take into account state property and contract law which governs real estate transactions in general and the enforceability and interpretation of mortgage lending instruments in particular. Thus, it would be within the Board's power to determine that it constitutes an unsafe lending practice for a federal savings and loan to conclude a real property mortgage without a fully enforceable due-on-sale clause. It would be within the authority delegated to it by Congress for the Board to conclude that a due-on-sale clause must be included in a mortgage instrument as a means of enabling a federal savings and loan to remove unprofitable loans from its portfolio.

Such a regulation would be entirely consistent with the approach taken by Congress in regulating the savings and loan industry. In § 8 of the Federal Home Loan Bank Act of 1932 (FHLBA), 12 U. S. C. § 1428, the precursor to HOLA, Congress has required the Board to examine state law "relating to the conveying or recording of land titles, or to homestead and other rights, or to *the enforcement of the rights of holders of mortgages on lands securing loans*." (Emphasis added.) Section 8 provides further:

> "If any such examination shall indicate, in the opinion of the board, that under the laws of any such State . . . there would be inadequate protection to a Federal Home Loan Bank in making or collecting advances under this chapter, the *board may withhold or limit the operation* of any Federal Home Loan Bank in such State until satisfactory conditions of law . . . shall be established." 12 U. S. C. § 1428 (emphasis added).

Thus, there is no indication in the FHLBA that the Board may, by promulgating regulations, pre-empt those state laws that are deemed to be economically unsound. Instead, if the Board concludes that California's limitations upon the enforceability of due-on-sale clauses endangers the soundness of the system established by the HOLA and the FHLBA, then the response contemplated by Congress is for the Board to "withhold or limit the operation" of the system in California.

In declaring the due-on-sale clause enforceable as a matter of federal law, however, the Board has departed from the approach contemplated by Congress. Although Congress has authorized the Board to regulate the lending activities of federal savings and loan associations, there is no indication in the HOLA itself, or in its legislative history, that Congress has empowered the Board to determine whether and when federal law shall govern the enforceability of particular provisions contained in mortgages concluded by federal savings and loan associations. If anything, § 8 of the FHLBA indicates that it was Congress' understanding in 1932 that the enforceability of provisions in mortgages is a matter of state law. Contract and real property law are traditionally the domain of state law. *Aronson* v. *Quick Point Pencil Co.*, 440 U. S. 257, 262 (1979); *Butner* v. *United States*, 440 U. S. 48, 55 (1979). In the HOLA, Congress did not intend to create a federal common law of mortgages. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630 (1981).*

The Board's attempt to enforce due-on-sale clauses as a matter of federal law cannot be upheld as a regulation of mortgage lending practices of federal savings and loan associations. In § 545.8-3(f), the Board has gone beyond regulating how, when, and in what manner a federal savings and loan may lend mortgage money. Instead, as the Court recognizes, *ante*, at 146-147, the Board's regulation purports to create a rule of law which will govern the rights and obligations of the parties to the mortgage instrument. This regulation does not simply delineate those provisions a federal savings and loan must or must not include in a mortgage instrument. Section 545.8-3(f) purports to guarantee the enforceability of a contractual provision notwithstanding state law to the contrary. In this case, the Board is not regulating the operation of federal savings and loan associa-

---

*The Board, however, has argued that federal common law does govern the contractual relationship between federal savings and loan institutions and their mortgagors. See *Gulf Federal Sav. & Loan* v. *Federal Home Loan Bank Bd.*, 651 F. 2d 259, 266 (CA5 1981), cert. pending, No. 81-1744; Brief for Federal Home Loan Bank Board et al. as *Amici Curiae* 26, n. 21.

tions, but the operation of due-on-sale clauses. Without a congressional authorization more explicit than that relied upon by the Court, I conclude that the Board has entered a domain in which it is not authorized to override state laws.

The limitations the California courts have placed upon the enforceability of due-on-sale clauses do not impair the ability of the Board to regulate the manner in which federal savings and loan associations engage in mortgage lending. California has not interfered with the Board's determination that it constitutes an unsafe lending practice for a federal savings and loan to enter a loan agreement without a fully enforceable due-on-sale clause. California's rule regarding due-on-sale clauses is not invalid pursuant to the Supremacy Clause simply because it makes it difficult for lenders to eliminate unprofitable mortgage loans from their portfolios.

Although the Board has concluded that the California courts' limitations upon the enforceability of due-on-sale clauses is economically unsound, I cannot agree that Congress has enabled the Board to insulate federal savings and loans from California mortgage law merely by promulgating a regulation that declares these clauses to be enforceable. Discharge of its mission to ensure the soundness of federal savings and loans does not authorize the Federal Home Loan Bank Board to intrude into the domain of state property and contract law that Congress has left to the States.

BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, ET AL. *v.* ROWLEY, BY HER PARENTS, ROWLEY ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-1002. Argued March 23, 1982—Decided June 28, 1982

The Education of the Handicapped Act (Act) provides federal money to assist state and local agencies in educating handicapped children. To qualify for federal assistance, a State must demonstrate, through a detailed plan submitted for federal approval, that it has in effect a policy that assures all handicapped children the right to a "free appropriate public education," which policy must be tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP). The IEP must be prepared (and reviewed at least annually) by school officials with participation by the child's parents or guardian. The Act also requires that a participating State provide specified administrative procedures by which the child's parents or guardian may challenge any change in the evaluation and education of the child. Any party aggrieved by the state administrative decisions is authorized to bring a civil action in either a state court or a federal district court. Respondents—a child with only minimal residual hearing who had been furnished by school authorities with a special hearing aid for use in the classroom and who was to receive additional instruction from tutors, and the child's parents—filed suit in Federal District Court to review New York administrative proceedings that had upheld the school administrators' denial of the parents' request that the child also be provided a qualified sign-language interpreter in all of her academic classes. Entering judgment for respondents, the District Court found that although the child performed better than the average child in her class and was advancing easily from grade to grade, she was not performing as well academically as she would without her handicap. Because of this disparity between the child's achievement and her potential, the court held that she was not receiving a "free appropriate public education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." The Court of Appeals affirmed.

Held:

1. The Act's requirement of a "free appropriate public education" is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Pp. 187–204.

(a) This interpretation is supported by the definitions contained in the Act, as well as by other provisions imposing procedural requirements and setting forth statutory findings and priorities for States to follow in extending educational services to handicapped children. The Act's language contains no express substantive standard prescribing the level of education to be accorded handicapped children. Pp. 187–190.

(b) The Act's legislative history shows that Congress sought to make public education available to handicapped children, but did not intend to impose upon the States any greater substantive educational standard than is necessary to make such access to public education meaningful. The Act's intent was more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside. Pp. 191–197.

(c) While Congress sought to provide assistance to the States in carrying out their constitutional responsibilities to provide equal protection of the laws, it did not intend to achieve strict equality of opportunity or services for handicapped and nonhandicapped children, but rather sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. The Act does not require a State to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Pp. 198–200.

2. In suits brought under the Act's judicial-review provisions, a court must first determine whether the State has complied with the statutory procedures, and must then determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. Pp. 204–208.

(a) Although the judicial-review provisions do not limit courts to ensuring that States have complied with the Act's procedural requirements, the Act's emphasis on procedural safeguards demonstrates the legislative conviction that adequate compliance with prescribed procedures will in most cases assure much, if not all, of what Congress wished in the way of substantive content in an IEP. Pp. 204–207.

(b) The courts must be careful to avoid imposing their view of preferable educational methods upon the States. Once a court determines that the Act's requirements have been met, questions of methodology are for resolution by the States. Pp. 207–208.

3. Entrusting a child's education to state and local agencies does not leave the child without protection. As demonstrated by this case, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act. Pp. 208–209.

4. The Act does not require the provision of a sign-language interpreter here. Neither of the courts below found that there had been a failure to comply with the Act's procedures, and the findings of neither court will support a conclusion that the child's educational program failed to comply with the substantive requirements of the Act. Pp. 209–210.

632 F. 2d 945, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 210. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 212.

Raymond G. Kuntz argued the cause for petitioners. With him on the briefs were *Robert D. Stone*, *Jean M. Coon*, *Paul E. Sherman, Jr.*, and *Donald O. Meserve*.

Michael A. Chatoff argued the cause and filed a brief for respondents.

Elliott Schulder argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Walter W. Barnett*, and *Louise A. Lerner*.*

---

*Briefs of *amici curiae* urging affirmance were filed by *Charles S. Sims* for the American Civil Liberties Union; by *Jane Bloom Yohalem*, *Norman S. Rosenberg*, *Daniel Yohalem*, and *Marian Wright Edelman* for the

JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents a question of statutory interpretation. Petitioners contend that the Court of Appeals and the District Court misconstrued the requirements imposed by Congress upon States which receive federal funds under the Education of the Handicapped Act. We agree and reverse the judgment of the Court of Appeals.

I

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U. S. C. § 1401 *et seq.* (1976 ed. and Supp. IV), provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures. The Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" H. R. Rep. No. 94-332, p. 2 (1975) (H. R. Rep.). The Act's evolution and major provisions shed light on the question of statutory interpretation which is at the heart of this case.

Congress first addressed the problem of educating the handicapped in 1966 when it amended the Elementary and

---

Association for Retarded Citizens of the United States et al.; by *Ralph J. Moore, Jr.*, and *Franklin D. Kramer* for the Maryland Advocacy Unit for the Developmentally Disabled, Inc., et al.; by *Marc Charmatz*, *Janet Stotland*, and *Joseph Blum* for the National Association of the Deaf et al; by *Minna J. Kotkin* and *Barry Felder* for the New York State Commission on the Quality of Care for the Mentally Disabled, Protection and Advocacy System; and by *Michael A. Rebell* for the United Cerebral Palsy Associations, Inc., et al.

Norman H. Gross, *Gwendolyn H. Gregory*, *Thomas A. Shannon*, and *August W. Steinhilber* filed a brief for the National School Boards Association et al. as *amici curiae*.

Secondary Education Act of 1965 to establish a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children." Pub. L. 89–750, § 161, 80 Stat. 1204. That program was repealed in 1970 by the Education of the Handicapped Act, Pub. L. 91–230, 84 Stat. 175, Part B of which established a grant program similar in purpose to the repealed legislation. Neither the 1966 nor the 1970 legislation contained specific guidelines for state use of the grant money; both were aimed primarily at stimulating the States to develop educational resources and to train personnel for educating the handicapped.[1]

Dissatisfied with the progress being made under these earlier enactments, and spurred by two District Court decisions holding that handicapped children should be given access to a public education,[2] Congress in 1974 greatly increased federal funding for education of the handicapped and for the first time required recipient States to adopt "a goal of providing full educational opportunities to all handicapped children." Pub. L. 93–380, 88 Stat. 579, 583 (1974 statute). The 1974 statute was recognized as an interim measure only, adopted "in order to give the Congress an additional year in which to study what if any additional Federal assistance [was] required to enable the States to meet the needs of handicapped children." H. R. Rep., at 4. The ensuing year of study produced the Education for All Handicapped Children Act of 1975.

In order to qualify for federal financial assistance under the Act, a State must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U. S. C. § 1412(1). That policy must be reflected in a state plan submitted to and approved by the Secretary of Education,[3] § 1413, which describes in detail the goals, programs, and timetables under which the State intends to educate handicapped children within its borders. §§ 1412, 1413. States receiving money under the Act must provide education to the handicapped by priority, first "to handicapped children who are not receiving an education" and second "to handicapped children . . . with the most severe handicaps who are receiving an inadequate education," § 1412(3), and "to the maximum extent appropriate" must educate handicapped children "with children who are not handicapped." § 1412(5).[4] The Act broadly defines "handicapped children" to include "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, [and] other health impaired children, [and] children with specific learning disabilities." § 1401(1).[5]

---

[1] See S. Rep. No. 94–168, p. 5 (1975) (S. Rep.); H. R. Rep., at 2–3.

[2] Two cases, *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972), and *Pennsylvania Assn. for Retarded Children* v. *Commonwealth*, 334 F. Supp. 1257 (ED Pa. 1971) and 343 F. Supp. 279 (1972), were later identified as the most prominent of the cases contributing to Congress' enactment of the Act and the statutes which preceded it. H. R. Rep., at 3–4. Both decisions are discussed in Part III of this opinion.

The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP).

---

[3] All functions of the Commissioner of Education, formerly an officer in the Department of Health, Education, and Welfare, were transferred to the Secretary of Education in 1979 when Congress passed the Department of Education Organization Act, 20 U. S. C. § 3401 *et seq.* (1976 ed., Supp. IV). See 20 U. S. C. § 3441(a)(1) (1976 ed., Supp. IV).

[4] Despite this preference for "mainstreaming" handicapped children—educating them with nonhandicapped children—Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that "the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." § 1412(5). The Act thus provides for the education of some handicapped children in separate classes or institutional settings. See *ibid.;* § 1413(a)(4).

[5] In addition to covering a wide variety of handicapping conditions, the Act requires special educational services for children "regardless of the severity of their handicap." §§ 1412(2)(C), 1414(a)(1)(A).

§ 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written document containing

> "(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." § 1401(19).

Local or regional educational agencies must review, and where appropriate revise, each child's IEP at least annually. § 1414(a)(5). See also § 1413(a)(11).

In addition to the state plan and the IEP already described, the Act imposes extensive procedural requirements upon States receiving federal funds under its provisions. Parents or guardians of handicapped children must be notified of any proposed change in "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child," and must be permitted to bring a complaint about "any matter relating to" such evaluation and education. §§ 1415(b)(1)(D) and (E).[6]

---

[6] The requirements that parents be permitted to file complaints regarding their child's education, and be present when the child's IEP is formulated, represent only two examples of Congress' effort to maximize parental involvement in the education of each handicapped child. In addition, the Act requires that parents be permitted "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and . . . to obtain an independent educational evaluation of the child." § 1415(b)(1)(A). See also §§ 1412(4), 1414(a)(4). State educa-

Complaints brought by parents or guardians must be resolved at "an impartial due process hearing," and appeal to the state educational agency must be provided if the initial hearing is held at the local or regional level. §§ 1415(b)(2) and (c).[7] Thereafter, "[a]ny party aggrieved by the findings and decision" of the state administrative hearing has "the right to bring a civil action with respect to the complaint . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2).

Thus, although the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility. Compliance is assured by provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the Act, §§ 1414(b)(2)(A), 1416, and by the provision for judicial review. At present, all States except New

---

tional policies and the state plan submitted to the Secretary of Education must be formulated in "consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children." § 1412(7). See also § 1412(2)(E). Local agencies, which receive funds under the Act by applying to the state agency, must submit applications which assure that they have developed procedures for "the participation and consultation of the parents or guardian[s] of [handicapped] children" in local educational programs, § 1414(a)(1)(C)(iii), and the application itself, along with "all pertinent documents related to such application," must be made "available to parents, guardians, and other members of the general public." § 1414(a)(4).

[7] "Any party" to a state or local administrative hearing must

"be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions." § 1415(d).

Mexico receive federal funds under the portions of the Act at issue today. Brief for United States as *Amicus Curiae* 2, n. 2.

II

This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, N. Y. Amy has minimal residual hearing and is an excellent lipreader. During the year before she began attending Furnace Woods, a meeting between her parents and school administrators resulted in a decision to place her in a regular kindergarten class in order to determine what supplemental services would be necessary to her education. Several members of the school administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who are also deaf. At the end of the trial period it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities. Amy successfully completed her kindergarten year.

As required by the Act, an IEP was prepared for Amy during the fall of her first-grade year. The IEP provided that Amy should be educated in a regular classroom at Furnace Woods, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with parts of the IEP but insisted that Amy also be provided a qualified sign-language interpreter in all her academic classes in lieu of the assistance proposed in other parts of the IEP. Such an interpreter had been placed in Amy's kindergarten class for a 2-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administrators likewise concluded that Amy did not need such an interpreter in her first-grade classroom. They reached this conclusion after consulting the school district's Committee on the Handicapped, which had received expert evidence from Amy's parents on the importance of a sign-language interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

When their request for an interpreter was denied, the Rowleys demanded and received a hearing before an independent examiner. After receiving evidence from both sides, the examiner agreed with the administrators' determination that an interpreter was not necessary because "Amy was achieving educationally, academically, and socially" without such assistance. App. to Pet. for Cert. F–22. The examiner's decision was affirmed on appeal by the New York Commissioner of Education on the basis of substantial evidence in the record. *Id.*, at E–4. Pursuant to the Act's provision for judicial review, the Rowleys then brought an action in the United States District Court for the Southern District of New York, claiming that the administrators' denial of the sign-language interpreter constituted a denial of the "free appropriate public education" guaranteed by the Act.

The District Court found that Amy "is a remarkably well-adjusted child" who interacts and communicates well with her classmates and has "developed an extraordinary rapport" with her teachers. 483 F. Supp. 528, 531 (1980). It also found that "she performs better than the average child in her class and is advancing easily from grade to grade," *id.*, at 534, but "that she understands considerably less of what goes on in class than she could if she were not deaf" and thus "is not learning as much, or performing as well academically, as she would without her handicap," *id.*, at 532. This disparity between Amy's achievement and her potential led the court to decide that she was not receiving a "free appropriate public education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." *Id.*, at 534. According to the District Court, such a standard "requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children." *Ibid.* The District Court's definition arose from its assumption that the responsibility for "giv[ing] content to the requirement of an 'appropriate education'" had "been left entirely to the [federal] courts and the hearing officers." *Id.*, at 533.[8]

A divided panel of the United States Court of Appeals for the Second Circuit affirmed. The Court of Appeals "agree[d] with the [D]istrict [C]ourt's conclusions of law," and held that its "findings of fact [were] not clearly erroneous." 632 F. 2d 945, 947 (1980).

We granted certiorari to review the lower courts' interpretation of the Act. 454 U. S. 961 (1981). Such review requires us to consider two questions: What is meant by the Act's requirement of a "free appropriate public education"? And what is the role of state and federal courts in exercising the review granted by 20 U. S. C. § 1415? We consider these questions separately.[9]

---

[8] For reasons that are not revealed in the record, the District Court concluded that "[t]he Act itself does not define 'appropriate education.'" 483 F. Supp., at 533. In fact, the Act expressly defines the phrase "free appropriate public education," see § 1401(18), to which the District Court was referring. See 483 F. Supp., at 533. After overlooking the statutory definition, the District Court sought guidance not from regulations interpreting the Act, but from regulations promulgated under § 504 of the Rehabilitation Act. See 483 F. Supp., at 533, citing 45 CFR § 84.33(b).

[9] The IEP which respondents challenged in the District Court was created for the 1978–1979 school year. Petitioners contend that the District Court erred in reviewing that IEP after the school year had ended and before the school administrators were able to develop another IEP for subsequent years. We disagree. Judicial review invariably takes more than

III

A

This is the first case in which this Court has been called upon to interpret any provision of the Act. As noted previously, the District Court and the Court of Appeals concluded that "[t]he Act itself does not define 'appropriate education,'" 483 F. Supp., at 533, but leaves "to the courts and the hearing officers" the responsibility of "giv[ing] content to the requirement of an 'appropriate education.'" *Ibid.* See also 632 F. 2d, at 947. Petitioners contend that the definition of the phrase "free appropriate public education" used by the courts below overlooks the definition of that phrase actually found in the Act. Respondents agree that the Act defines "free appropriate public education," but contend that the statutory definition is not "functional" and thus "offers judges no guidance in their consideration of controversies involving 'the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education.'" Brief for Respondents 28. The United States, appearing as *amicus curiae* on behalf of respondents, states that "[a]lthough the Act includes definitions of a 'free appropriate public education' and other related terms, the statutory definitions do not adequately explain what is meant by 'appropriate.'" Brief for United States as *Amicus Curiae* 13.

We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education":

---

nine months to complete, not to mention the time consumed during the preceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdiction to grant relief because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review. 483 F. Supp. 536, 538 (1980). See *Murphy* v. *Hunt*, 455 U. S. 478, 482 (1982); *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975).

> "The term 'free appropriate public education' means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." § 1401(18) (emphasis added).

"Special education," as referred to in this definition, means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." § 1401(16). "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education." § 1401(17).[10]

Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent. Whether or not the definition is a "functional" one, as respondents contend it is not, it is the principal tool which Congress has given us for parsing the critical phrase of the Act. We think more must be made of it than either respondents or the United States seems willing to admit.

According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

---

[10] Examples of "related services" identified in the Act are "speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only." § 1401(17).

Other portions of the statute also shed light upon congressional intent. Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were "excluded entirely from the public school system" and more than half were receiving an inappropriate education. 89 Stat. 774, note following § 1401. In addition, as mentioned in Part I, the Act requires States to extend educational services first to those children who are receiving no education and second to those children who are receiving an "inadequate education." § 1412(3). When these express statutory findings and priorities are read together with the Act's extensive procedural requirements and its definition of "free appropriate public education," the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child.

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children "commensurate with the opportunity provided to other children." 483 F. Supp., at 534. That standard was expounded by the District Court without reference to the statutory definitions or even to the legislative history of the Act. Although we find the statutory definition of "free appropriate public education" to be helpful in our interpretation of the Act, there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard. For an answer, we turn to that history.[11]

---

[11] The dissent, finding that "the standard of the courts below seems . . . to reflect the congressional purpose" of the Act, *post*, at 218, concludes that our answer to this question "is not a satisfactory one." *Post*, at 216. Presumably, the dissent also agrees with the District Court's conclusion that "it has been left entirely to the courts and the hearing officers to give content to the requirement of an 'appropriate education.'" 483 F. Supp., at 533. It thus seems that the dissent would give the courts *carte blanche* to impose upon the States whatever burden their various judgments indicate should be imposed. Indeed, the dissent clearly characterizes the requirement of an "appropriate education" as open-ended, noting that "if there are limits not evident from the face of the statute on what may be considered an 'appropriate education,' they must be found in the purpose of the statute or its legislative history." *Post*, at 213. Not only are we unable to find any suggestion from the face of the statute that the requirement of an "appropriate education" was to be limitless, but we also view the dissent's approach as contrary to the fundamental proposition that Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously. See *infra*, at 204, n. 26.

No one can doubt that this would have been an easier case if Congress had seen fit to provide a more comprehensive statutory definition of the phrase "free appropriate public education." But Congress did not do so, and "our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam* v. *United States*, 340 U. S. 593, 596 (1951). We would be less than faithful to our obligation to construe what Congress has written if in this case we were to disregard the statutory language and legislative history of the Act by concluding that Congress had imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts.

B

(i)

As suggested in Part I, federal support for education of the handicapped is a fairly recent development. Before passage of the Act some States had passed laws to improve the educational services afforded handicapped children,[12] but many of these children were excluded completely from any form of public education or were left to fend for themselves in classrooms designed for education of their nonhandicapped peers. As previously noted, the House Report begins by emphasizing this exclusion and misplacement, noting that millions of handicapped children "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" H. R. Rep., at 2. See also S. Rep., at 8. One of the Act's two principal sponsors in the Senate urged its passage in similar terms:

> "While much progress has been made in the last few years, we can take no solace in that progress until all handicapped children are, in fact, receiving an education. The most recent statistics provided by the Bureau of Education for the Handicapped estimate that . . . 1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education." 121 Cong. Rec. 19486 (1975) (remarks of Sen. Williams).

This concern, stressed repeatedly throughout the legislative history,[13] confirms the impression conveyed by the language of the statute: By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." S. Rep., at 11. Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

---

[12] See H. R. Rep., at 10; Note, The Education of All Handicapped Children Act of 1975, 10 U. Mich. J. L. Ref. 110, 119 (1976).

[13] See, *e. g.*, 121 Cong. Rec. 19494 (1975) (remarks of Sen. Javits) ("all too often, our handicapped citizens have been denied the opportunity to receive an adequate education"); *id.*, at 19502 (remarks of Sen. Cranston) (millions of handicapped "children . . . are largely excluded from the educational opportunities that we give to our other children"); *id.*, at 23708 (remarks of Rep. Mink) ("handicapped children . . . are denied access to public schools because of a lack of trained personnel").

Both the House and the Senate Reports attribute the impetus for the Act and its predecessors to two federal-court judgments rendered in 1971 and 1972. As the Senate Report states, passage of the Act "followed a series of landmark court cases establishing in law the right to education for all handicapped children." S. Rep., at 6.[14] The first case, *Pennsylvania Assn. for Retarded Children* v. *Commonwealth*, 334 F. Supp. 1257 (ED Pa. 1971) and 343 F. Supp. 279 (1972) *(PARC)*, was a suit on behalf of retarded children challenging the constitutionality of a Pennsylvania statute which acted to exclude them from public education and training. The case ended in a consent decree which enjoined the State from "deny[ing] to any mentally retarded child *access* to a free public program of education and training." 334 F. Supp., at 1258 (emphasis added).

PARC was followed by *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972), a case in which the plaintiff handicapped children had been excluded from the District of Columbia public schools. The court's judgment, quoted in S. Rep., at 6, provided that

---

[14] Similarly, the Senate Report states that it was an "[i]ncreased awareness of the educational needs of handicapped children and landmark court decisions establishing the right to education for handicapped children [that] pointed to the necessity of an expanded federal fiscal role." S. Rep., at 5. See also H. R. Rep., at 2–3.

> "no [handicapped] child eligible for a publicly supported education in the District of Columbia public schools shall be *excluded* from a regular school assignment by a Rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) *adequate* alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the *adequacy* of any educational alternative." 348 F. Supp., at 878 (emphasis added).

Mills and *PARC* both held that handicapped children must be given *access* to an adequate, publicly supported education. Neither case purports to require any particular substantive level of education.[15] Rather, like the language of the Act, the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children. See 348 F. Supp., at 878–883; 334 F. Supp., at 1258–1267.[16] The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports[17] suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act. Indeed, immediately after discussing these cases the Senate Report describes the 1974 statute as having "incorporated the major principles of the right to education cases." S. Rep., at 8. Those principles in turn became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 statute. H. R. Rep., at 5.[18]

---

[15] The only substantive standard which can be implied from these cases comports with the standard implicit in the Act. *PARC* states that each child must receive "access to a free public program of education and training *appropriate to his learning capacities*," 334 F. Supp., at 1258 (emphasis added), and that further state action is required when it appears that "the needs of the mentally retarded child are not being *adequately* served," *id.*, at 1266. (Emphasis added.) *Mills* also speaks in terms of "adequate" educational services, 348 F. Supp., at 878, and sets a realistic standard of providing *some* educational services to each child when every need cannot be met.

"If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." *Id.*, at 876.

---

[16] Like the Act, *PARC* required the State to "identify, locate, [and] evaluate" handicapped children, 334 F. Supp., at 1267, to create for each child an individual educational program, *id.*, at 1265, and to hold a hearing "on any change in educational assignment," *id.*, at 1266. *Mills* also required the preparation of an individual educational program for each child. In addition, *Mills* permitted the child's parents to inspect records relevant to the child's education, to obtain an independent educational evaluation of the child, to object to the IEP and receive a hearing before an independent hearing officer, to be represented by counsel at the hearing, and to have the right to confront and cross-examine adverse witnesses, all of which are also permitted by the Act. 348 F. Supp., at 879–881. Like the Act, *Mills* also required that the education of handicapped children be conducted pursuant to an overall plan prepared by the District of Columbia, and established a policy of educating handicapped children with nonhandicapped children whenever possible. *Ibid.*

[17] See S. Rep., at 6–7; H. R. Rep., at 3–4.

[18] The 1974 statute "incorporated the major principles of the right to education cases," by "add[ing] important new provisions to the Education of the Handicapped Act which require the States to: establish a goal of providing full educational opportunities to all handicapped children; provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children; establish procedures to insure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped; . . . and, establish procedures to insure that testing and evaluation materials and procedures utilized for the purposes of classification

That the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education is perhaps best demonstrated by the fact that Congress, in explaining the need for the Act, equated an "appropriate education" to the receipt of some specialized educational services. The Senate Report states: "[T]he most recent statistics provided by the Bureau of Education for the Handicapped estimate that of the more than 8 million children . . . with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education." S. Rep., at 8.[19] This statement, which reveals Congress' view that 3.9 million handicapped children were "receiving an appropriate education" in 1975, is followed immediately in the Senate Report by a table showing that 3.9 million handicapped children were "served" in 1975 and a slightly larger number were "unserved." A similar statement and table appear in the House Report. H. R. Rep., at 11–12.

---

and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory." S. Rep., at 8.

The House Report explains that the Act simply incorporated these purposes of the 1974 statute: the Act was intended "primarily to amend . . . the Education of the Handicapped Act in order to provide permanent authorization and a comprehensive mechanism which will insure that those provisions enacted during the 93rd Congress [the 1974 statute] will result in maximum benefits for handicapped children and their families." H. R. Rep., at 5. Thus, the 1974 statute's purpose of providing handicapped children *access* to a public education became the purpose of the Act.

[19] These statistics appear repeatedly throughout the legislative history of the Act, demonstrating a virtual consensus among legislators that 3.9 million handicapped children were receiving an appropriate education in 1975. See, *e. g.*, 121 Cong. Rec. 19486 (1975) (remarks of Sen. Williams); *id.*, at 19504 (remarks of Sen. Schweicker); *id.*, at 23702 (remarks of Rep. Madden); *ibid.* (remarks of Rep. Brademas); *id.*, at 23709 (remarks of Rep. Minish); *id.*, at 37024 (remarks of Rep. Brademas); *id.*, at 37027 (remarks of Rep. Gude); *id.*, at 37417 (remarks of Sen. Javits); *id.*, at 37420 (remarks of Sen. Hathaway).

It is evident from the legislative history that the characterization of handicapped children as "served" referred to children who were receiving some form of specialized educational services from the States, and that the characterization of children as "unserved" referred to those who were receiving no specialized educational services. For example, a letter sent to the United States Commissioner of Education by the House Committee on Education and Labor, signed by two key sponsors of the Act in the House, asked the Commissioner to identify the number of handicapped "children served" in each State. The letter asked for statistics on the number of children "being served" in various types of "special education program[s]" and the number of children who were not "receiving educational services." Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 205–207 (1975). Similarly, Senator Randolph, one of the Act's principal sponsors in the Senate, noted that roughly one-half of the handicapped children in the United States "are receiving special educational services." *Id.*, at 1.[20] By characterizing the 3.9 million handicapped children who were "served" as children who were "receiving an appropriate education," the Senate and House Reports unmistakably disclose Congress' perception of the type of education required by the Act: an "appropriate education" is provided when personalized educational services are provided.[21]

---

[20] Senator Randolph stated: "[O]nly 55 percent of the school-aged handicapped children and 22 percent of the pre-school-aged handicapped children are receiving special educational services." Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 1 (1975). Although the figures differ slightly in various parts of the legislative history, the general thrust of congressional calculations was that roughly one-half of the handicapped children in the United States were not receiving specialized educational services, and thus were not "served." See, *e. g.*, 121 Cong. Rec. 19494 (1975) (remarks of Sen. Javits) ("only 50 percent of the Nation's handicapped children received proper education services"); *id.*, at 19504 (remarks of Sen. Humphrey) ("[a]lmost 3 million handicapped children, while in school, receive none of the special services that they require in order to make education a meaningful experience"); *id.*, at 23706 (remarks of Rep. Quie) ("only 55 percent [of handicapped children] were receiving a public education"); *id.*, at 23709 (remarks of Rep. Biaggi) ("[o]ver 3 million [handi-

---

capped] children in this country are receiving either below par education or none at all").

Statements similar to those appearing in the text, which equate "served" as it appears in the Senate Report to "receiving special educational services," appear throughout the legislative history. See, *e. g.*, *id.*, at 19492 (remarks of Sen. Williams); *id.*, at 19494 (remarks of Sen. Javits); *id.*, at 19496 (remarks of Sen. Stone); *id.*, at 19504–19505 (remarks of Sen. Humphrey); *id.*, at 23703 (remarks of Rep. Brademas); Hearings on H. R. 7217 before the Subcommittee on Select Education of the House Committee on Education and Labor, 94th Cong., 1st Sess., 91, 150, 153 (1975); Hearings on H. R. 4199 before the Select Subcommittee on Education of the House Committee on Education and Labor, 93d Cong., 1st Sess., 130, 139 (1973). See also 34 CFR § 300.343 (1981).

[21] In seeking to read more into the Act than its language or legislative history will permit, the United States focuses upon the word "appropriate," arguing that "the statutory definitions do not adequately explain what [it means]." Brief for United States as *Amicus Curiae* 13. Whatever Congress meant by an "appropriate" education, it is clear that it did not mean a potential-maximizing education.

The term as used in reference to educating the handicapped appears to have originated in the *PARC* decision, where the District Court required that handicapped children be provided with "education and training appropriate to [their] learning capacities." 334 F. Supp., at 1258. The word appears again in the *Mills* decision, the District Court at one point referring to the need for "an appropriate educational program," 348 F. Supp., at 879, and at another point speaking of a "suitable publicly-supported education," *id.*, at 878. Both cases also refer to the need for an "adequate" education. See 334 F. Supp., at 1266; 348 F. Supp., at 878.

The use of "appropriate" in the language of the Act, although by no means definitive, suggests that Congress used the word as much to describe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education. For example, § 1412(5) requires that handicapped children be educated in classrooms with nonhandicapped children "to the maximum extent appro-

(ii)

Respondents contend that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." Brief for Respondents 35. We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children." Respondents and the United States correctly note that Congress sought "to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws." S. Rep., at 13.[22] But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services.

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandi-

---

priate." Similarly, § 1401(19) provides that, "whenever appropriate," handicapped children should attend and participate in the meeting at which their IEP is drafted. In addition, the definition of "free appropriate public education" itself states that instruction given handicapped children should be at an "appropriate preschool, elementary, or secondary school" level. § 1401(18)(C). The Act's use of the word "appropriate" thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children. At the very least, these statutory uses of the word refute the contention that Congress used "appropriate" as a term of art which concisely expresses the standard found by the lower courts.

[22] See also 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams); *id.*, at 19504 (remarks of Sen. Humphrey).

capped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

The legislative conception of the requirements of equal protection was undoubtedly informed by the two District Court decisions referred to above. But cases such as *Mills* and *PARC* held simply that handicapped children may not be excluded entirely from public education. In *Mills*, the District Court said:

> "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom." 348 F. Supp., at 876.

The *PARC* court used similar language, saying "[i]t is the commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity . . . ." 334 F. Supp., at 1260. The right of access to free public education enunciated by these cases is significantly different from any notion of absolute equality of opportunity regardless of capacity. To the extent that Congress might have looked further than these cases which are mentioned in the legislative history, at the time of enactment of the Act this Court had held at least twice that the Equal Protection Clause of the Fourteenth

Amendment does not require States to expend equal financial resources on the education of each child. *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973); *McInnis* v. *Shapiro*, 293 F. Supp. 327 (ND Ill. 1968), aff'd *sub nom. McInnis* v. *Ogilvie*, 394 U. S. 322 (1969).

In explaining the need for federal legislation, the House Report noted that "no congressional legislation has required a precise guarantee for handicapped children, i. e. a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children." H. R. Rep., at 14. Assuming that the Act was designed to fill the need identified in the House Report—that is, to provide a "basic floor of opportunity" consistent with equal protection—neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.

(iii)

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.[23]

---

[23] This view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency. After referring to statistics showing that many handicapped children were excluded from public education, the Senate Report states:

"The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep., at 9.

See also H. R. Rep., at 11. Similarly, one of the principal Senate sponsors of the Act stated that "providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams). See also *id.*, at 25541 (remarks of Rep. Harkin); *id.*, at 37024–37025 (remarks of Rep. Brademas); *id.*, at 37027 (remarks of Rep. Gude); *id.*, at 37410 (remarks of Sen. Randolph); *id.*, at 37416 (remarks of Sen. Williams).

The desire to provide handicapped children with an attainable degree of personal independence obviously anticipated that state educational programs would confer educational benefits upon such children. But at the same time, the goal of achieving some degree of self-sufficiency in most cases is a good deal more modest than the potential-maximizing goal adopted by the lower courts.

Despite its frequent mention, we cannot conclude, as did the dissent in the Court of Appeals, that self-sufficiency was itself the substantive stand-

The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible.[24] When that "mainstreaming" preference of the Act

---

ard which Congress imposed upon the States. Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, "self-sufficiency" as a substantive standard is at once an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence of Congress' intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap.

[24] Title 20 U. S. C. § 1412(5) requires that participating States establish "procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the

has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the Act.[25]

C

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of

---

nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

[25] We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a "free appropriate public education." In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration accorded by the Furnace Woods school administrators, to be dispositive.

the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.[26]

IV

A

As mentioned in Part I, the Act permits "[a]ny party aggrieved by the findings and decision" of the state administrative hearings "to bring a civil action" in "any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2). The complaint, and therefore the civil action, may concern "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." § 1415(b)(1)(E). In reviewing the complaint, the Act provides that a court "shall receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(e)(2).

---

[26] In defending the decisions of the District Court and the Court of Appeals, respondents and the United States rely upon isolated statements in the legislative history concerning the achievement of maximum potential, see H. R. Rep., at 13, as support for their contention that Congress intended to impose greater substantive requirements than we have found. These statements, however, are too thin a reed on which to base an interpretation of the Act which disregards both its language and the balance of its legislative history. "Passing references and isolated phrases are not controlling when analyzing a legislative history." *Department of State* v. *Washington Post Co.*, 456 U. S. 595, 600 (1982).

Moreover, even were we to agree that these statements evince a congressional intent to maximize each child's potential, we could not hold that Congress had successfully imposed that burden upon the States.

> "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School* v. *Halderman*, 451 U. S. 1, 17 (1981) (footnote omitted).

As already demonstrated, the Act and its history impose no requirements on the States like those imposed by the District Court and the Court of Appeals. *A fortiori* Congress has not done so unambiguously, as required in the valid exercise of its spending power.

The parties disagree sharply over the meaning of these provisions, petitioners contending that courts are given only limited authority to review for state compliance with the Act's procedural requirements and no power to review the substance of the state program, and respondents contending that the Act requires courts to exercise *de novo* review over state educational decisions and policies. We find petitioners' contention unpersuasive, for Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make "independent decision[s] based on a preponderance of the evidence." S. Conf. Rep. No. 94–455, p. 50 (1975). See also 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams).

But although we find that this grant of authority is broader than claimed by petitioners, we think the fact that it is found in § 1415, which is entitled "Procedural safeguards," is not without significance. When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, *e. g.*, §§ 1415(a)–(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. And we find nothing in the Act to suggest that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself. In short, the statutory authorization to grant "such relief as the court determines is appropriate" cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress.

Therefore, a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act?[27] And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?[28] If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

---

[27] This inquiry will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act,

B

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States.[29] The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." § 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress in-

---

but also to determine that the State has created an IEP for the child in question which conforms with the requirements of § 1401(19).

[28] When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit. See Part III, *supra*.

[29] In this case, for example, both the state hearing officer and the District Court were presented with evidence as to the best method for educating the deaf, a question long debated among scholars. See Large, Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975, 58 Wash. U. L. Q. 213, 229 (1980). The District Court accepted the testimony of respondents' experts that there was "a trend supported by studies showing the greater degree of success of students brought up in deaf households using [the method of communication used by the Rowleys]." 483 F. Supp., at 535.

tended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2).[30]

We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S., at 42. We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

V

Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, *supra*, at 182–183, and n. 6, and in the formulation of the child's individual educational program. As the Senate Report states:

> "The Committee recognizes that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome. By changing the language [of the provision relating to individualized educational programs] to emphasize the process of parent and child

---

[30] It is clear that Congress was aware of the States' traditional role in the formulation and execution of educational policy. "Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level." 121 Cong. Rec. 19498 (1975) (remarks of Sen. Dole). See also *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities").

> involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child." S. Rep., at 11–12.

See also S. Conf. Rep. No. 94–445, p. 30 (1975); 34 CFR § 300.345 (1981). As this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act.[31]

VI

Applying these principles to the facts of this case, we conclude that the Court of Appeals erred in affirming the decision of the District Court. Neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements of the Act. On the contrary, the District Court found that the "evidence firmly establishes that Amy is receiving an

---

[31] In addition to providing for extensive parental involvement in the formulation of state and local policies, as well as the preparation of individual educational programs, the Act ensures that States will receive the advice of experts in the field of educating handicapped children. As a condition for receiving federal funds under the Act, States must create "an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, [and] (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children." § 1413(a)(12).

'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." 483 F. Supp., at 534. In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[32]

So ordered.

JUSTICE BLACKMUN, concurring in the judgment.

Although I reach the same result as the Court does today, I read the legislative history and goals of the Education of the Handicapped Act differently. Congress unambiguously stated that it intended to "take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided *equal educational opportunity.*" S. Rep. No. 94–168, p. 9 (1975) (emphasis added). See also 20 U. S. C. § 1412(2)(A)(i) (requiring States to establish plans with the "goal of providing full educational opportunity to all handicapped children").

As I have observed before, "[i]t seems plain to me that Congress, in enacting [this statute], intended to do more than merely set out politically self-serving but essentially meaningless language about what the [handicapped] deserve at the hands of state . . . authorities." *Pennhurst State School* v. *Halderman*, 451 U. S. 1, 32 (1981) (opinion concurring in part and concurring in judgment). The clarity of the legislative intent convinces me that the relevant question here is not, as the Court says, whether Amy Rowley's individualized education program was "reasonably calculated to enable [her] to receive educational benefits," *ante*, at 207, measured in part by whether or not she "achieve[s] passing marks and advance[s] from grade to grade," *ante*, at 204. Rather, the question is whether Amy's program, *viewed as a whole*, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates. This is a standard predicated on equal educational opportunity and equal access to the educational process, rather than upon Amy's achievement of any particular educational outcome.

---

[32] Because the District Court declined to reach respondents' contention that petitioners had failed to comply with the Act's procedural requirements in developing Amy's IEP, 483 F. Supp., at 533, n. 8, the case must be remanded for further proceedings consistent with this opinion.

In answering this question, I believe that the District Court and the Court of Appeals should have given greater deference than they did to the findings of the School District's impartial hearing officer and the State's Commissioner of Education, both of whom sustained petitioners' refusal to add a sign-language interpreter to Amy's individualized education program. Cf. 20 U. S. C. § 1415(e)(2) (requiring reviewing court to "receive the records of the administrative proceedings" before granting relief). I would suggest further that those courts focused too narrowly on the presence or absence of a particular service—a sign-language interpreter—rather than on the total package of services furnished to Amy by the School Board.

As the Court demonstrates, *ante*, at 184–185, petitioner Board has provided Amy Rowley considerably more than "a teacher with a loud voice." See *post*, at 215 (dissenting opinion). By concentrating on whether Amy was "learning as much, or performing as well academically, as she would without her handicap," 483 F. Supp. 528, 532 (SDNY 1980), the District Court and the Court of Appeals paid too little attention to whether, on the entire record, respondent's individualized education program offered her an educational opportunity substantially equal to that provided her nonhandicapped classmates. Because I believe that standard has been satisfied here, I agree that the judgment of the Court of Appeals should be reversed.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In order to reach its result in this case, the majority opinion contradicts itself, the language of the statute, and the legislative history. Both the majority's standard for a "free appropriate education" and its standard for judicial review disregard congressional intent.

I

The majority first turns its attention to the meaning of a "free appropriate public education." The Act provides:

> "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U. S. C. § 1401(18).

The majority reads this statutory language as establishing a congressional intent limited to bringing "previously excluded handicapped children into the public education systems of the States and [requiring] the States to adopt *procedures* which would result in individualized consideration of and instruction for each child." *Ante*, at 189. In its attempt to constrict the definition of "appropriate" and the thrust of the Act, the majority opinion states: "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.'" *Ante*, at 189–190, quoting 483 F. Supp. 528, 534 (SDNY 1980).

I agree that the language of the Act does not contain a substantive standard beyond requiring that the education offered must be "appropriate." However, if there are limits not evident from the face of the statute on what may be considered an "appropriate education," they must be found in the purpose of the statute or its legislative history. The Act itself announces it will provide a "*full* educational opportunity to all handicapped children." 20 U. S. C. § 1412(2)(A) (emphasis added). This goal is repeated throughout the legislative history, in statements too frequent to be "'passing references and isolated phrases.'"[1] *Ante*, at 204, n. 26, quoting *Department of State* v. *Washington Post Co.*, 456 U. S. 595, 600 (1982). These statements elucidate the meaning of "appropriate." According to the Senate Report, for example, the Act does "guarantee that handicapped children are provided *equal* educational opportunity." S. Rep. No. 94–168, p. 9 (1975) (emphasis added). This promise appears throughout the legislative history. See 121 Cong. Rec. 19482–19483 (1975) (remarks of Sen. Randolph); *id.*, at 19504 (Sen. Humphrey); *id.*, at 19505 (Sen. Beall); *id.*, at 23704 (Rep. Brademas); *id.*, at 25538 (Rep. Cornell); *id.*, at 25540 (Rep. Grassley); *id.*, at 37025 (Rep. Perkins); *id.*, at

---

[1] The Court's opinion relies heavily on the statement, which occurs throughout the legislative history, that, at the time of enactment, one million of the roughly eight million handicapped children in the United States were excluded entirely from the public school system and more than half were receiving an inappropriate education. See, *e. g.*, *ante*, at 189, 195, 196–197, n. 20. But this statement was often linked to statements urging equal educational opportunity. See, *e. g.*, 121 Cong. Rec. 19502 (1975) (remarks of Sen. Cranston); *id.*, at 23702 (remarks of Rep. Brademas). That is, Congress wanted not only to bring handicapped children into the schoolhouse, but also to benefit them once they had entered.

37030 (Rep. Mink); *id.*, at 37412 (Sen. Taft); *id.*, at 37413 (Sen. Williams); *id.*, at 37418–37419 (Sen. Cranston); *id.*, at 37419–37420 (Sen. Beall). Indeed, at times the purpose of the Act was described as tailoring each handicapped child's educational plan to enable the child "to achieve his or her maximum potential." H. R. Rep. No. 94–332, pp. 13, 19 (1975); see 121 Cong. Rec. 23709 (1975). Senator Stafford, one of the sponsors of the Act, declared: "We can all agree that education [given a handicapped child] should be equivalent, at least, to the one those children who are not handicapped receive." *Id.*, at 19483. The legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children.

The majority opinion announces a different substantive standard, that "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Ante*, at 192. While "meaningful" is no more enlightening than "appropriate," the Court purports to clarify itself. Because Amy was provided with *some* specialized instruction from which she obtained *some* benefit and because she passed from grade to grade, she was receiving a meaningful and therefore appropriate education.[2]

---

[2] As further support for its conclusion, the majority opinion turns to *Pennsylvania Assn. for Retarded Children* v. *Commonwealth*, 334 F. Supp. 1257 (ED Pa. 1971), 343 F. Supp. 279 (1972) *(PARC)*, and *Mills* v. *Board of Education of District of Columbia*, 348 F. Supp. 866 (DC 1972). That these decisions served as an impetus for the Act does not, however, establish them as the limits of the Act. In any case, the very language that the majority quotes from *Mills*, *ante*, at 193, 199, sets a standard not of *some* education, but of educational opportunity equal to that of nonhandicapped children.

Indeed, *Mills*, relying on decisions since called into question by this Court's opinion in *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973), states:

"In Hobson v. Hansen, [269 F. Supp. 401 (DC 1967),] Judge Wright found that denying poor public school children educational opportunity equal to

This falls far short of what the Act intended. The Act details as specifically as possible the kind of specialized education each handicapped child must receive. It would apparently satisfy the Court's standard of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child," *ante*, at 201, for a deaf child such as Amy to be given a teacher with a loud voice, for she would benefit from that service. The Act requires more. It defines "special education" to mean "specifically designed instruction, at no cost to parents or guardians, to *meet the unique needs* of a handicapped child . . . ." § 1401(16) (emphasis added).[3] Providing a teacher with a loud voice would not meet Amy's needs and would not satisfy the Act. The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign-language interpreter, comprehends less than half of what is said in the classroom—less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.

Despite its reliance on the use of "appropriate" in the definition of the Act, the majority opinion speculates that "Congress used the word as much to describe the settings in which

---

that available to more affluent public school children was violative of the Due Process Clause of the Fifth Amendment. *A fortiori*, the defendants' conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause." 348 F. Supp., at 875.

Whatever the effect of *Rodriguez* on the validity of this reasoning, the statement exposes the majority's mischaracterization of the opinion and thus of the assumptions of the legislature that passed the Act.

[3] "Related services" are "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education." § 1401(17).

handicapped children should be educated as to prescribe the substantive content or supportive services of their education." *Ante*, at 197, n. 21. Of course, the word "appropriate" can be applied in many ways; at times in the Act, Congress used it to recommend mainstreaming handicapped children; at other points, it used the word to refer to the content of the individualized education. The issue before us is what standard the word "appropriate" incorporates when it is used to modify "education." The answer given by the Court is not a satisfactory one.

II

The Court's discussion of the standard for judicial review is as flawed as its discussion of a "free appropriate public education." According to the Court, a court can ask only whether the State has "complied with the procedures set forth in the Act" and whether the individualized education program is "reasonably calculated to enable the child to receive educational benefits." *Ante*, at 206, 207. Both the language of the Act and the legislative history, however, demonstrate that Congress intended the courts to conduct a far more searching inquiry.

The majority assigns major significance to the review provision's being found in a section entitled "Procedural safeguards." But where else would a provision for judicial review belong? The majority does acknowledge that the current language, specifying that a court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate," § 1415(e)(2), was substituted at Conference for language that would have restricted the role of the reviewing court much more sharply. It is clear enough to me that Congress decided to reduce substantially judicial deference to state administrative decisions.

The legislative history shows that judicial review is not limited to procedural matters and that the state educational agencies are given first, but not final, responsibility for the content of a handicapped child's education. The Conference Committee directs courts to make an "independent decision." S. Conf. Rep. No. 94–455, p. 50 (1975). The deliberate change in the review provision is an unusually clear indication that Congress intended courts to undertake substantive review instead of relying on the conclusions of the state agency.

On the floor of the Senate, Senator Williams, the chief sponsor of the bill, Committee Chairman, and floor manager responsible for the legislation in the Senate, emphasized the breadth of the review provisions at both the administrative and judicial levels:

> "Any parent or guardian may present a complaint concerning *any matter* regarding the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child. In this regard, Mr. President, I would like to stress that the language referring to 'free appropriate education' has been adopted to make clear that a complaint may involve matters such as questions respecting a child's individualized education program, questions of whether special education and related services are being provided without charge to the parents or guardians, questions relating to whether the services provided a child meet the standards of the State education agency, or *any other question* within the scope of the definition of 'free appropriate public education.' In addition, it should be clear that a parent or guardian may present a complaint alleging that a State or local education agency has refused to provide services to which a child may be entitled or alleging that the State or local educational agency has erroneously classified a child as a handicapped child when, in fact, that child is not a handicapped child." 121 Cong. Rec. 37415 (1975) (emphasis added).

There is no doubt that the state agency itself must make substantive decisions. The legislative history reveals that the courts are to consider, *de novo*, the same issues. Senator Williams explicitly stated that the civil action permitted under the Act encompasses all matters related to the original complaint. *Id.*, at 37416.

Thus, the Court's limitations on judicial review have no support in either the language of the Act or the legislative history. Congress did not envision that inquiry would end if a showing is made that the child is receiving passing marks and is advancing from grade to grade. Instead, it intended to permit a full and searching inquiry into any aspect of a handicapped child's education. The Court's standard, for example, would not permit a challenge to part of the IEP; the legislative history demonstrates beyond doubt that Congress intended such challenges to be possible, even if the plan as developed is reasonably calculated to give the child some benefits.

Parents can challenge the IEP for failing to supply the special education and related services needed by the individual handicapped child. That is what the Rowleys did. As the Government observes, "courts called upon to review the content of an IEP, in accordance with 20 U. S. C. [§] 1415(e) inevitably are required to make a judgment, on the basis of the evidence presented, concerning whether the educational methods proposed by the local school district are 'appropriate' for the handicapped child involved." Brief for United States as *Amicus Curiae* 13. The courts below, as they were required by the Act, did precisely that.

Under the judicial review provisions of the Act, neither the District Court nor the Court of Appeals was bound by the State's construction of what an "appropriate" education means in general or by what the state authorities considered to be an appropriate education for Amy Rowley. Because the standard of the courts below seems to me to reflect the congressional purpose and because their factual findings are not clearly erroneous, I respectfully dissent.

FORD MOTOR CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-300. Argued April 20, 1982—Decided June 28, 1982

Held: An employer charged with discrimination in hiring under Title VII of the Civil Rights Act of 1964 can toll the continuing accrual of backpay liability under § 706(g) of Title VII by unconditionally offering the claimant the job previously denied, and is not required to offer seniority retroactive to the date of the alleged discrimination. Thus, absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability. Pp. 225-241.

(a) This rule serves Title VII's objective of ending discrimination through voluntary compliance, for it gives the employer a strong incentive to hire the claimant. To require a retroactive seniority offer in addition to the unconditional job offer fails to provide the same incentive, because it makes hiring the claimant more costly than hiring another applicant for the same job. Pp. 228-230.

(b) An unemployed or underemployed claimant's statutory obligation to minimize damages under § 706(g) requires him to accept an unconditional job offer, even without retroactive seniority. The rule announced here merely embodies such requirement of minimizing damages, without affecting the claimant's right to compensation. Pp. 230-234.

(c) The rule announced here also is consistent with the policy of full compensation when the claimant has had the good fortune to find a more attractive job than that offered by the employer charged with discrimination, because the availability of the better job terminates the ongoing ill effect of the latter's refusal to hire the claimant. Pp. 234-236.

(d) Since the rule announced here rests both on the statutory requirement that a claimant minimize damages and on the fact that he no longer incurs additional injury if he has been able to find other work at least as attractive as the charged employer's, the rule in almost all circumstances is consistent with Title VII's object of making injured claimants whole. Pp. 236-239.

(e) To require a retroactive seniority offer in addition to the unconditional job offer would threaten the interests of innocent incumbent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee would be unfairly laid off or disadvantaged because a Title VII claimant has been granted seniority. Pp. 239-240.

645 F. 2d 183, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 241.

John R. Wester argued the cause for petitioner. With him on the briefs were *Robert L. Stern*, *H. R. Nolte, Jr.*, and *Stephen D. Bolerjack*.

David A. Strauss argued the cause *pro hac vice* for respondent. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, *Michael J. Connolly*, *Philip B. Sklover*, and *Vella M. Fink*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether an employer charged with discrimination in hiring can toll the continuing accrual of backpay liability under § 706(g) of Title VII, 42 U. S. C. § 2000e-5(g), simply by unconditionally offering the claimant the job previously denied, or whether the employer also must offer seniority retroactive to the date of the alleged discrimination.[1]

**Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

[1] The dissent asserts that by so "fram[ing] the question presented" we have "simply and completely misstate[d] the issue." *Post*, at 242. Apparently, neither party agrees with the dissent. The petitioner summarizes the question presented as "whether back pay due an employment discrimination claimant continues to accrue after the claimant has rejected an unconditional job offer that does not include retroactive seniority or back pay." Brief for Petitioner i. The respondent sums up the question presented as "[w]hether an employer who unlawfully refused to hire job applicants because they were women can terminate its liability for back pay by

The question has considerable practical significance because of the lengthy delays that too often attend Title VII litigation.[2] The extended time it frequently takes to obtain satisfaction in the courts may force a discrimination claimant to suffer through years of underemployment or unemployment before being awarded the job the claimant deserves. Court delays, of course, affect all litigants. But for the victim of job discrimination, delay is especially unfortunate. The claimant cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit. The claimant needs work that will feed a family and restore self-respect. A job is needed—now. In this case, therefore, we must determine how best to fashion the remedies available under Title VII to fulfill this basic need.

I

A

In June and July 1971, Judy Gaddis, Rebecca Starr, and Zettie Smith applied at a Ford Motor Co. (Ford) parts warehouse located in Charlotte, N. C., for jobs as "picker-packers," "picking" ordered parts from storage, and "packing" them for shipment. At the time, no woman had ever worked in that capacity at the Ford warehouse. All three women

---

subsequently offering the applicants positions without seniority at a time when they had obtained, and accumulated seniority in, other jobs." Brief for Respondent i.

To buttress the assertion that the Court has addressed a question not presented, the dissent claims that we have "misrea[d]" the Court of Appeals' decision, "transform[ing] a narrow Court of Appeals ruling into a broad one, just so [we could] reverse and install a broad new rule of [our] own choosing," *post*, at 249, n. 8, rather than attempt, as best we are able, to decide the particular case actually before us. Because we believe we have correctly and fairly framed the question, we decline the opportunity to address further this *ad hominem* argument.

[2] The discriminatory refusals to hire involved in this case occurred 11 years ago.

were qualified for the positions: Gaddis and Starr recently had been laid off from equivalent jobs at a nearby General Motors (GM) warehouse, and Smith had comparable prior experience. Smith applied before any of the openings were filled, and Gaddis and Starr applied while at least two positions remained available.[3] Ford, however, filled the three vacant positions with men, and Gaddis filed a charge with the federal Equal Employment Opportunity Commission (EEOC), claiming that Ford had discriminated against her because of her sex.[4]

In January 1973, GM recalled Gaddis and Starr to their former positions at its warehouse. The following July, while they were still working at GM, a single vacancy opened up at Ford. Ford offered the job to Gaddis, without seniority retroactive to her 1971 application. Ford's offer, however, did not require Gaddis to abandon or compromise her Title VII claim against Ford. Gaddis did not accept the job, in part because she did not want to be the only woman working at the warehouse, and in part because she did not want to lose the seniority she had earned at GM. Ford then made the same unconditional offer to Starr, who declined for the same reasons. Gaddis and Starr continued to work at the GM warehouse, but in 1974 the warehouse was closed and they were laid off. They then unsuccessfully sought new employment until September 1975, when they entered a Government training program for the unemployed.

Smith applied again for work at Ford in 1973, but was never hired. She worked elsewhere, though at lower wages than she would have earned at Ford, during much of the time between 1971 and the District Court's decision in 1977.

---

[3] When this case came to trial, Ford claimed that Gaddis and Starr applied after men had already been hired and that Smith had not applied at all. The District Court found to the contrary, however, and the Court of Appeals upheld the findings.

[4] After Gaddis had filed her complaint, she and Starr continued to seek work at the Ford warehouse. In November 1972, Ford hired them and four other workers for six weeks to fill temporary jobs at the warehouse.

In contrast to Gaddis', Starr's, and Smith's difficulties, at least two of the three men hired by Ford in 1971 were still working at the warehouse at the time of the trial in 1977.

B

In July 1975, the EEOC sued Ford in the United States District Court for the Western District of North Carolina, alleging that Ford had violated Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), by refusing to hire women at the Charlotte warehouse. The Commission sought injunctive relief and backpay for the victims.[5]

After trial, the District Court found that Ford had discriminated against the three women on the basis of their sex and awarded them backpay in an amount equal to "the difference between the amount they would have earned had they been hired in August 1971, and the amounts actually earned or reasonably earnable by them" between that date and the date of the court's order. App. to Pet. for Cert. A–170. The District Court rejected Ford's contention that Gaddis and Starr were not entitled to backpay accruing after the dates on which they declined Ford's offer of employment. *Id.*, at A–170 to A–171.

The United States Court of Appeals for the Fourth Circuit affirmed the District Court's finding of unlawful discrimination, as well as the court's award to Gaddis and Starr of backpay that had accrued after July 1973, when the women rejected Ford's unconditional job offer. 645 F. 2d 183 (1981). The court suggested that, had Ford promised retroactive seniority with its job offer, the offer would have cut off

---

[5] Although the EEOC suit involved additional issues and claimants, we are concerned here with only the part of the suit that involved Gaddis, Starr, and Smith.

Ford's backpay liability. The court concluded, however, that without the promise of retroactive seniority, Ford's 1973 offer was "incomplete and unacceptable." *Id.*, at 193.[6]

Ford then petitioned this Court for a writ of certiorari, contending, *inter alia*, that its unconditional job offer to Gaddis and Starr should have cut off the further accrual of backpay liability.[7] We granted the writ. 454 U. S. 1030 (1981).

---

[6] Senior District Judge Walter E. Hoffman, sitting by designation, dissented from this portion of the Court of Appeals' decision.

[7] In its petition Ford raised two other issues. First, Ford read the opinion of the Court of Appeals as suggesting that to toll backpay liability an employer must include with his job offer, not just retroactive seniority, but also an offer of already-accrued backpay. The Court of Appeals' opinion did not expressly so hold, however, and before this Court the EEOC concedes that under Title VII such an offer of a lump-sum payment of backpay is not required to toll the continuing accrual of backpay liability. This issue thus is no longer contested by the parties.

The second issue is the only one involving Smith. Ford disputed the District Court's finding that Ford discriminated against the three women, claiming that the court reached its conclusion because it erroneously allocated the burden of proof. We are persuaded, however, that the District Court's findings were consistent with *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981).

In *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. See also *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567 (1978), and *Board of Trustees* v. *Sweeney*, 439 U. S. 24 (1978). Despite these decisions, some confusion continued to exist. In *Burdine* we reiterated that after a plaintiff has proved a prima facie case of discrimination, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" 450 U. S., at 253 (citation omitted). The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Ibid.* (citation omitted). It was then made clear that:

"The defendant need not persuade the Court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence

II

Section 706(g) of the Civil Rights Act of 1964, 78 Stat. 261, as amended, 42 U. S. C. § 2000e–5(g), governs the award of backpay in Title VII cases. In pertinent part, § 706(g) provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the

---

raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.*, at 254–255 (footnote omitted).

As neither the District Court nor the Court of Appeals cited *Burdine* (apparently because it had only recently been decided), we restate the foregoing principles. We conclude, however, on the basis of the specific findings of fact by the District Court, undisturbed by the Court of Appeals, that the plaintiffs in this case carried their burden of persuasion.

As *Burdine* commands, the District Court did not place the burden of persuasion on Ford. Instead, it began its discussion of liability by straightforwardly declaring that the EEOC "ha[d] established that Ford discriminated against Smith, Gaddis and Starr on the basis of their sex." App. to Pet. for Cert. A–167. The court supported this conclusion by pointing, not only to the EEOC's proof of a prima facie case, but also to "its showing that Ford had never hired women into the warehouse until November, 1972, and that [its] procedures for hiring were vague and were based on highly subjective criteria." *Id.*, at A–167 to A–168. The court, moreover, entered findings of fact discrediting each of Ford's proffered justifications for refusing to hire the women. *Id.*, at A–155 to A–161. This progression of factual findings and legal conclusions indicates that the District Court found by a preponderance of the evidence that Ford's justifications were "unworthy of credence," 450 U. S., at 256, and that the company had discriminated on the basis of sex. These findings are fully consistent with *Burdine*.

As Ford points out, the Court of Appeals opinion contains some statements that are arguably inconsistent with *Burdine*. That court corrected any misimpression generated by these statements, however, with a discussion directly focusing on the burden-of-proof issue. 645 F. 2d 183, 189, n. 5 (CA4 1981). In light of this discussion, and because it is clear that the trier of fact properly allocated the burden of proof, we find no merit in Ford's burden-of-proof argument.

> court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include, but is not limited to, . . . hiring of employees, *with or without* back pay, . . . or any other equitable relief as the court deems appropriate. . . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against *shall* operate to reduce the back pay otherwise allowable" (emphasis added).[8]

Under § 706(g), then, "backpay is not an automatic or mandatory remedy; . . . it is one which the courts 'may' invoke" in the exercise of their sound "discretion [which] is equitable in nature." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 415, 416 (1975). Nonetheless, while "the power to award backpay is a discretionary power," *id.*, at 447 (BLACKMUN, J., concurring in judgment), a "court must exercise this power 'in light of the large objectives of the Act,'" and, in doing so, must be guided by "meaningful standards" enforced by "thorough appellate review." *Id.*, at 416 (opinion of the Court) (citations omitted). Moreover, as we emphasized in *Albemarle Paper*, in Title VII cases

> "such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to

---

[8] Section 706(g) was "expressly modeled," *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 419, and n. 11 (1975), on the analogous remedial provision of the National Labor Relations Act (NLRA), § 10(c), 49 Stat. 454, as amended, 29 U. S. C. § 160(c). Section 10(c) provides that, if an unfair labor practice has been, or is being, committed, the National Labor Relations Board (NLRB) is empowered to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act.

The principles developed under the NLRA generally guide, but do not bind, courts in tailoring remedies under Title VII. See, *e. g.*, *Teamsters* v. *United States*, 431 U. S. 324, 366–367 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 768–770 (1976); *Albemarle Paper Co.*, *supra*, at 419, and n. 11. Therefore, throughout this opinion we refer to cases decided under the NLRA as well as under Title VII.

> be guided by sound legal principles.' *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). . . .
>
> "It is true that '[e]quity eschews mechanical rules . . . [and] depends on flexibility.' *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' *Moragne* v. *States Marine Lines*, 398 U. S. 375, 405 (1970)." *Id.*, at 416–417 (footnote omitted).

In this case, Ford and the EEOC offer competing standards to govern backpay liability. Ford argues that if an employer unconditionally offers a claimant the job for which he previously applied, the claimant's rejection of that offer should toll the continuing accrual of backpay liability.[9] The EEOC, on the other hand, defends the lower court's rule,[10] contending that backpay liability should be tolled only by the rejection of an offer that includes seniority retroactive to the date on which the alleged discrimination occurred. Our task is to determine which of these standards better coincides with the "large objectives" of Title VII.

---

[9] It should be clear that the contested backpay in this suit stems from the period following Ford's offer, and during which Gaddis and Starr were unemployed, *i. e.*, after the GM warehouse closed. Our decision today does not affect their right to claim backpay for the period before they rejected Ford's offers.

[10] For reasons of its own, the dissenting opinion reads the decision below narrowly and takes us to task for discerning the outlines of a "general rule" *post*, at 248 (emphasis deleted), in the opinion of the Court of Appeals. In this regard, we note that already at least one District Court evidently not only has read the opinion below as prescribing a general rule, but in addition has interpreted that rule more broadly than we do. See *Saunders* v. *Hercules, Inc.*, 510 F. Supp. 1137, 1142 (WD Va. 1981) ("in view of the recent Fourth Circuit Court of Appeals decision in *Equal Employment Opportunity Commission* v. *Ford Motor Company*, 645 F. 2d 183 (4th Cir. 1981) . . . [i]t is clear . . . that a person who has been discriminated against does not have to accept an offer of reemployment where back pay has not been offered").

III

The "primary objective" of Title VII is to bring employment discrimination to an end, *Albemarle Paper*, 422 U. S., at 417, by "'achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group . . . over other employees.'" *Ibid.* (quoting *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971)). See also *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). "[T]he preferred means for achieving" this goal is through "[c]ooperation and voluntary compliance." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974).

To accomplish this objective, the legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into "voluntary compliance" and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace. Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them. In a better world, perhaps, lawsuits brought under Title VII would speed to judgment so quickly that the effects of legal rules on the behavior of the parties during the pendency of litigation would not be as important a consideration. We do not now live in such a world, however, as this case illustrates.

The rule tolling the further accrual of backpay liability if the defendant offers the claimant the job originally sought well serves the objective of ending discrimination through voluntary compliance, for it gives an employer a strong incentive to hire the Title VII claimant. While the claimant may be no more attractive than the other job applicants, a job offer to the claimant will free the employer of the threat of liability for further backpay damages. Since paying backpay damages is like paying an extra worker who never came to work, Ford's proposed rule gives the Title VII claimant a decided edge over other competitors for the job he seeks.

The rule adopted by the court below, on the other hand, fails to provide the same incentive, because it makes hiring the Title VII claimant more costly than hiring one of the other applicants for the same job. To give the claimant retroactive seniority before an adjudication of liability, the employer must be willing to pay the additional costs of the fringe benefits that come with the seniority that newly hired workers usually do not receive. More important, the employer must also be prepared to cope with the deterioration in morale, labor unrest, and reduced productivity that may be engendered by inserting the claimant into the seniority ladder over the heads of the incumbents who have earned their places through their work on the job. In many cases, moreover, disruption of the existing seniority system will violate a collective-bargaining agreement, with all that such a violation entails for the employer's labor relations.[11] Under the rule adopted by the court below, the employer must be willing to accept all these additional costs if he hopes to toll his backpay liability by offering the job to the claimant. As a result, the employer will be less, rather than more, likely to hire the claimant.

In sum, the Court of Appeals' rule provides no incentive to employers to hire Title VII claimants. The rule advocated by Ford, by contrast, powerfully motivates employers to put Title VII claimants to work, thus ending ongoing discrimination as promptly as possible.[12]

---

[11] See *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 76 (1982) ("Seniority provisions are of 'overriding importance' in collective bargaining, . . . and they 'are universally included in these contracts' ") (quoting *Humphrey* v. *Moore*, 375 U. S. 335, 346 (1964), and *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 79 (1977)).

IV

Title VII's primary goal, of course, *is* to end discrimination; the victims of job discrimination want jobs, not lawsuits.[13] But when unlawful discrimination does occur, Title VII's secondary, fallback purpose is to compensate the victims for their injuries. To this end, § 706(g) aims "'to make the victims of unlawful discrimination whole'" by restoring them, "'so far as possible . . . to a position where they would have been were it not for the unlawful discrimination.'" *Albemarle Paper*, 422 U. S., at 421 (quoting 118 Cong. Rec. 7168 (1972) (remarks of Sen. Williams)). We now turn to consider whether the rule urged by Ford not only better serves the goal of ending discrimination, but also properly compensates injured Title VII claimants.

A

If Gaddis and Starr had rejected an unconditional offer from Ford before they were recalled to their jobs at GM, tolling Ford's backpay liability from the time of Ford's offer plainly would be consistent with providing Gaddis and Starr full compensation for their injuries. An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g).[14] This duty, rooted in an ancient principle of law,[15] requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position,[16] he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied.[17] Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.[18]

---

[12] In his dissent, JUSTICE BLACKMUN suggests that it is we who speak from the "comfor[t]" of the "sidelines," *post*, at 256, somewhere outside "the real world," *ibid.*, of sex discrimination. For all the dissent's rhetoric, however, nowhere does the dissent seriously challenge our conclusion that the rule we adopt will powerfully motivate employers to offer Title VII claimants the jobs they have been denied. But Rebecca Starr's trial testimony eloquently explains what claimants need: "I was just wanting that job so bad because you can't, a woman, when you've got three children, I needed the money, and I was wanting the job so bad." 4 Tr. 356. Thus, it is the rule applied by the court below which manifests a "studied indifference to the real-life concerns," *post*, at 255, of the victims of sex discrimination.

[13] See 118 Cong. Rec. 7569 (1972) (remarks of Rep. Dent during debate on 1972 amendments to Title VII) ("Most people just want to work. That is all. They want an opportunity to work. We are trying to see that all of us, no matter of what race, sex, or religious or ethnic background, will have equal opportunity in employment").

---

[14] The provision expressly states that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U. S. C. § 2000e–5(g).

Claimants often take other lesser or dissimilar work during the pendency of their claims, even though doing so is not mandated by the statutory requirement that a claimant minimize damages or forfeit his right to compensation. See, *e. g.*, *Merriweather* v. *Hercules, Inc.*, 631 F. 2d 1161 (CA5 1980) (voluntary minimization of damages in dissimilar work); *Thornton* v. *East Texas Motor Freight*, 497 F. 2d 416, 422 (CA6 1974) (voluntary minimization of damages by moonlighting).

[15] See generally, *e. g.*, C. McCormick, Law of Damages 127–158 (1935). McCormick summarizes "the general rule" as follows: "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." *Id.*, at 127.

In connection with the remedial provisions of the NLRA, we said: "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 197–198 (1941).

[16] See, *e. g.*, *NLRB* v. *Madison Courier, Inc.*, 153 U. S. App. D. C. 232, 245–246, 472 F. 2d 1307, 1320–1321 (1972) (employee need not "seek employment which is not consonant with his particular skills, background, and experience" or "which involves conditions that are substantially more onerous than his previous position"); *Wonder Markets, Inc.*, 236 N. L. R. B. 787, 787 (1978) (offer of reinstatement ineffective when discharged em-

An employer's unconditional offer of the job originally sought to an unemployed or underemployed claimant, moreover, need not be supplemented by an offer of retroactive seniority to be effective, lest a defendant's offer be irrationally disfavored relative to other employers' offers of substantially similar jobs. The claimant, after all, plainly would be required to minimize his damages by accepting another em-

---

ployee offered a different job, though former position still existed), enf'd, 598 F. 2d 666, 676 (CA1 1979), supplemental decision, 249 N. L. R. B. 294 (1980); *Good Foods Manufacturing & Processing Corp.*, 195 N. L. R. B. 418, 419 (1972) (offer of reinstatement ineffective because job offered had different conditions of employment and benefits), supplemental decision, 200 N. L. R. B. 623 (1972), enf'd, 492 F. 2d 1302 (CA7 1974); *Harvey Carlton*, 143 N. L. R. B. 295, 304 (1963) (offer of reinstatement ineffective because employees would return on probation).

Some lower courts have indicated, however, that after an extended period of time searching for work without success, a claimant must consider taking a lower-paying position. See, *e. g.*, *NLRB* v. *Madison Courier, Inc.*, *supra*, at 245–246, 472 F. 2d, at 1320–1321; *NLRB* v. *Southern Silk Mills, Inc.*, 242 F. 2d 697, 700 (CA6), cert. denied, 355 U. S. 821 (1957). If the claimant decides to go into a dissimilar line of work, or to accept a demotion, his earnings must be deducted from any eventual backpay award. See § 706(g); *Merriweather* v. *Hercules, Inc.*, *supra*, at 1168; *Taylor* v. *Philips Industries, Inc.*, 593 F. 2d 783, 787 (CA7 1979) *(per curiam)*.

[17] *NLRB* v. *Arduini Mfg. Corp.*, 394 F. 2d 420 (CA1 1968).

[18] The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim against the employer, in whole or in part. Thus, an applicant or discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised. See, *e. g.*, *NLRB* v. *St. Marys Sewer Pipe Co.*, 146 F. 2d 995, 996 (CA3 1945).

ployer's offer even though it failed to grant the benefits of seniority not yet earned.[19] Of course, if the claimant fulfills the requirement that he minimize damages by accepting the defendant's unconditional offer, he remains entitled to full compensation if he wins his case.[20] A court may grant him backpay accrued prior to the effective date of the offer,[21] retroactive seniority,[22] and compensation for any losses suffered as a result of his lesser seniority before the court's judgment.[23]

---

[19] For the same reasons, a defendant's job offer is effective to force minimization of damages by an unemployed or underemployed claimant even without a supplemental offer of backpay, since the claimant would be required to accept another employer's offer of a substantially similar job without a large front-end, lump-sum bonus. See, *e. g., NLRB* v. *Midwest Hanger Co.*, 550 F. 2d 1101, 1103 (CA8) ("It is clear that had the Company's offer of reinstatement been conditioned solely on its refusal to give back pay, as the Company strenuously argues, then the offer of reinstatement would not have been invalidated"), cert. denied, 434 U. S. 830 (1977); *Reliance Clay Products Co.*, 105 N. L. R. B. 135, 137 (1953) ("The Board has consistently held that a discriminatorily discharged employee may not refuse" an unconditioned offer of reinstatement even though unaccompanied by backpay; refusal of such an offer tolls the employer's liability for backpay).

[20] In tailoring a Title VII remedy a court "'has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 418 (quoting *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965)).

[21] See, *e. g., NLRB* v. *Huntington Hospital, Inc.*, 550 F. 2d 921, 924 (CA4 1977).

[22] See, *e. g., Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982); *Teamsters* v. *United States*, 431 U. S. 324 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976).

Decisions construing the remedial provision of the NLRA, § 10(c), 29 U. S. C. § 160(c), are in accord. See, *e. g., In re Nevada Consolidated Copper Corp.*, 26 N. L. R. B. 1182, 1235 (1940) (persons unlawfully refused jobs must be offered jobs with "any seniority or other rights and privileges they would have acquired, had the respondent not unlawfully discriminated against them") (quoted in *Franks* v. *Bowman Transportation Co., supra*, at 770), enf. denied, 122 F. 2d 587 (CA10 1941), rev'd, 316 U. S. 105 (1942).

In short, the unemployed or underemployed claimant's statutory obligation to minimize damages requires him to accept an unconditional offer of the job originally sought, even without retroactive seniority. Acceptance of the offer preserves, rather than jeopardizes, the claimant's right to be made whole; in the case of an unemployed or underemployed claimant, Ford's suggested rule merely embodies the existing requirement of § 706(g) that the claimant minimize damages, without affecting his right to compensation.

B

Ford's proposed rule also is consistent with the policy of full compensation when the claimant has had the good fortune to find a more attractive job than the defendant's, because the availability of the better job terminates the ongoing ill effects of the defendant's refusal to hire the claimant. For example, if Gaddis and Starr considered their jobs at GM to be so far superior to the jobs originally offered by Ford that, even if Ford had hired them at the outset, they would have left Ford's employ to take the new work, continuing to hold Ford responsible for backpay after Gaddis and Starr lost their GM jobs would be to require, in effect, that Ford insure them against the risks of unemployment in a new and independent undertaking. Such a rule would not merely restore Gaddis and Starr to the "'position where they would have been were it not for the unlawful discrimination,'" *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 421 (citation omitted); it would catapult them into a better position than they would have enjoyed in the absence of discrimination.

Likewise, even if Gaddis and Starr considered their GM jobs only somewhat better or even substantially equivalent to the positions they would have held at Ford had Ford hired them initially,[24] their rejection of Ford's unconditional offer could be taken to mean that they believed that the lingering ill effects of Ford's prior refusal to hire them had been extinguished by later developments. If, for example, they thought that the Ford and GM jobs were identical in every respect, offering identical pay, identical conditions of employment, and identical risks of layoff, Gaddis and Starr would have been utterly indifferent as to which job they had—Ford's or GM's. Assuming that they could work at only one job at a time, the ongoing economic ill effects caused by Ford's prior refusal to hire them would have ceased when they found the identical jobs at GM, and they would have had no reason to accept Ford's offers. As in the case of a claimant who lands a better job, therefore, requiring a defendant to provide what amounts to a form of unemployment insurance to claimants, after they have found identical jobs and refused the defendant's unconditional job offer, would be, absent special circumstances, to grant them something more than compensation for their injuries.

---

[23] Both Ford and the EEOC agree on this point. See Brief for Respondent 19; Reply Brief for Petitioner 9.

In both of these situations, the claimant has the power to accept the defendant's offer and abandon the superior or substantially equivalent replacement job. As in the case of an unemployed or underemployed claimant, under the rule advocated by Ford acceptance of the defendant's unconditional offer would preserve fully the ultimately victorious claimant's right to full redress for the effects of discrimination.[25] The claimant who chooses not to follow this path does so, then, not because it provides inadequate compensation, but because the value of the replacement job outweighs the value of the defendant's job supplemented by the prospect of full court-ordered compensation. In other words, the victim of discrimination who finds a better or substantially equivalent job no longer suffers ongoing injury stemming from the unlawful discrimination.

---

[24] It is possible that they did so value the GM jobs, since they applied at Ford only after being laid off at GM, and since after being recalled to the GM jobs they rejected Ford's offer. Therefore, contrary to the dissent's erroneous suggestion, *post*, at 253, the possibility that Gaddis and Starr considered their GM jobs superior to the positions they would have had at Ford had Ford hired them at the outset is not merely a "hypothetical case." We cannot infer that they so valued their GM jobs, however, solely from their rejection of Ford's offer.

[25] See discussion *supra*, at 232–234.

C

Thus, the rule advocated by Ford rests comfortably both on the statutory requirement that a Title VII claimant must minimize damages and on the fact that a claimant is no longer incurring additional injury if he has been able to find other suitable work that, all things considered, is at least as attractive as the defendant's. For this reason, in almost all circumstances the rule is fully consistent with Title VII's object of making injured claimants whole.

The sole question that can be raised regarding whether the rule adequately compensates claimants arises in that narrow category of cases in which the claimant believes his replacement job to be superior to the defendant's job without seniority, but inferior to the defendant's job with the benefits of seniority. In the present case, for example, it is possible that Gaddis and Starr considered their GM jobs more attractive than the jobs offered by Ford, but less satisfactory than the positions they would have held at Ford if Ford had hired them initially. If so, they were confronted with two options. They could have accepted Ford's unconditional offer, preserving their right to full compensation if they prevailed on their Title VII claims, but forfeiting their favorable positions at GM. Alternatively, they could have kept their jobs at GM, retaining the possibility of continued employment there, but, under the operation of the rule advocated here by Ford, losing the right to claim further backpay from Ford after the date of Ford's offer. The court below concluded that under these circumstances Ford's rule would present Gaddis and Starr with an "intolerable choice," 645 F. 2d, at 192, depriving them of the opportunity to receive full compensation.

We agree that Gaddis and Starr had to choose between two alternatives. We do not agree, however, that their opportunity to choose deprived them of compensation. After all, they had the option of accepting Ford's unconditional offer and retaining the right to seek full compensation at trial, which would comport fully with Title VII's goal of making discrimination victims whole. Under the rule advocated by Ford, if Gaddis and Starr chose the option of remaining at their GM jobs rather than accept Ford's offer, it was because they thought that the GM jobs, plus their claims to backpay accrued prior to Ford's offer, were *more* valuable to them than the jobs they originally sought from Ford, plus the right to seek full compensation from the court.[26] It is hard to see how Gaddis and Starr could have been deprived of adequate compensation because they chose to venture upon a path that seemed to them more attractive than the Ford job plus the right to seek full compensation in court.

---

[26] Employees value a job for many reasons besides the rate of pay, including, for example, the presence of other workers of the employee's own sex, the availability of recreational facilities at the worksite, staggered work hours, better health benefits, longer vacations, and so forth. What makes one job better than another varies from one employee to another.

Gaddis and Starr presumably rejected Ford's offer because they thought their jobs at GM were worth more to them than full compensation (Ford's offer plus a court award) discounted by the risks of litigation. In essence, the position adopted by the court below and advocated here by the EEOC turns on the fact that we cannot be sure that, had Gaddis and Starr known they were going to win their lawsuit, they still would have rejected Ford's offer. Had they known they were going to win, of course, they would have rejected the Ford job only if they valued the GM jobs more than they valued the combination of Ford's job plus the value of court-ordered compensation *un*discounted by the risks of litigation. To agree with the EEOC is, in effect, to contend that a claimant is not made whole for purposes of Title VII unless he decided to stay at a replacement job that was worth to him more than the sum of (1) the defendant's job, (2) the right to seek full court-ordered compensation, and, in addition, (3) a sum analogous to insurance against the risk of loss at trial. We discern, however, no reason for concluding that Title VII requires the defendant to insure the claimant against the possibility that the defendant might prevail in the lawsuit.

If the choice presented to Gaddis and Starr was difficult, it was only because it required them to assess their likelihood of prevailing at trial. But surely it cannot be contended for this reason alone that they were deprived of their right to adequate compensation. It is a fact of life that litigation is risky and that a plaintiff with a claim to compensation for his losses must consider the possibility that the claim might be lost at trial, either wrongly, because of litigation error, or rightly, because the defendant was innocent. Ford's rule merely requires the Title VII claimant to decide whether to take the job offered by the defendant, retaining his rights to an award by the court of backpay accrued prior to the effective date of the offer, and any court-ordered retroactive seniority plus compensation for any losses suffered as a result of his lesser seniority before the court's judgment, or, instead, whether to accept a more attractive job from another employer and the limitation of the claim for backpay to the damages that have already accrued. The rule urged by the EEOC and adopted by the court below, by contrast, would have the perverse result of requiring the employer in effect to insure the claimant against the risk that the employer might win at trial.

Therefore, we conclude that, when a claimant rejects the offer of the job he originally sought, as supplemented by a right to full court-ordered compensation, his choice can be taken as establishing that he considers the ongoing injury he has suffered at the hands of the defendant to have been ended by the availability of better opportunities elsewhere. For this reason, we find that, absent special circumstances,[27] the simple rule that the ongoing accrual of backpay liability is tolled when a Title VII claimant rejects the job he originally sought comports with Title VII's policy of making discrimination victims whole.

---

[27] If, for example, the claimant has been forced to move a great distance to find a replacement job, a rejection of the employer's offer might reflect the costs of relocation more than a judgment that the replacement job was superior, all things considered, to the defendant's job. In exceptional circumstances, the trial court, in the exercise of its sound discretion, could give weight to such factors when deciding whether backpay damages ac-

V

Although Title VII remedies depend primarily upon the objectives discussed above, the statute also permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U. S. 702, 723 (1978). See also *Teamsters* v. *United States*, 431 U. S. 324, 371–376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proved, and may never prove, unlawful discrimination. As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees.[28] In light of the "'overriding impor-

---

crued after the rejection of an employer's offer should be awarded to the claimant.

The dissent attempts to characterize "the loss of their accumulated seniority at [a] replacement jo[b]" as such a cost of relocation. *Post*, at 252–253, n. 11. By so doing, the dissent simply confuses the costs of changing from one job to another—whatever the respective advantages and disadvantages of the two jobs might be—with the differences between the two jobs.

[28] Seniority may govern, "'not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, 'bumping' possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and [even] a preferred place in the punch-out line.'" *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 766–767 (quoting Stacy, Title VII Seniority Remedies in a Time of Economic Downturn, 28 Vand. L. Rev. 487, 490 (1975)).

tance'" of these rights, *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 76 (1982) (quoting *Humphrey* v. *Moore*, 375 U. S. 335, 346 (1964)), we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proved, unlawful discrimination.

The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that "'the large objectives'" of Title VII, *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 416 (citation omitted), require innocent employees to carry such a heavy burden.[29]

---

[29] In addition to the rights of innocent employees, the rule urged by the EEOC and adopted by the court below burdens innocent employers. An innocent employer—or one who believes himself innocent—has the right to challenge in court claims he considers weak or baseless. The approach endorsed by the lower court undermines this right by requiring the employer, if he wishes to offer some relief to the claimant and toll the mounting backpay bill, to surrender his defense to the charge that the claimant is entitled to retroactive seniority. If the employer offers the claimant retroactive seniority as well as a job, and then prevails at trial, he will have no recourse against the claimant for the costs of the retroactive seniority that the claimant erroneously received. The rule urged by Ford permits the parties to stem the ongoing effects of the alleged discrimination without compelling either claimant or employer to compromise his claims or surrender his defenses. Cf. *Moro Motors Ltd.*, 216 N. L. R. B. 192, 193 (1975) ("were [an employer] required to offer to an employee, allegedly discharged for discriminatory reasons, reinstatement *with accrued back pay*, the [employer's] right to litigate the issue of whether the discharge was unlawful would for all practical purposes be nullified") (emphasis in original); *National Screen Products Co.*, 147 N. L. R. B. 746, 747–748 (1964).

VI

In conclusion, we find that the rule adopted by the court below disserves Title VII's primary goal of getting the victims of employment discrimination into the jobs they deserve as quickly as possible. The rule, moreover, threatens the interests of other, innocent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority.

On the other hand, the rule that a Title VII claimant's rejection of a defendant's job offer normally ends the defendant's ongoing responsibility for backpay suffers neither of these disadvantages, while nevertheless adequately satisfying Title VII's compensation goals. Most important, it also serves as a potent force on behalf of Title VII's objective of bringing discrimination to an end more quickly than is often possible through litigation. For these reasons we hold that, absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability. We reverse the judgment of the Court of Appeals and remand for proceedings consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

After finding that petitioner Ford Motor Company had discriminated unlawfully against Judy Gaddis and Rebecca Starr because of their sex, the Court of Appeals affirmed the District Court's backpay award to the two women "as a proper exercise of discretion founded on not clearly erroneous factual determinations." 645 F. 2d 183, 201 (CA4 1981). The Court today reverses this unremarkable holding with a wide-ranging advisory ruling stretching far beyond the confines of this case. The Court's rule provides employers who have engaged in unlawful hiring practices with a unilateral device to cut off their backpay liability to the victims of their past discrimination.

To justify its new rule, the Court mischaracterizes the holding of the Court of Appeals, undertakes an intricate economic analysis of hypothetical situations not presented here, and invokes the rights of "'innocent third parties,'" *ante*, at 239, who are not before the Court. By so doing, the Court not only supplants traditional district court discretion to mold equitable relief, but also ensures that Judy Gaddis and Rebecca Starr—the only Title VII claimants whose rights are at issue in this lawsuit—will not be made whole for injury they indisputably have suffered. I find the Court's ruling both unnecessary and unfair. I dissent.

I

A

The Court frames the question presented as "whether an employer charged with discrimination in hiring can toll the continuing accrual of backpay liability . . . simply by unconditionally offering the [Title VII] claimant the job previously denied, or whether the employer also must offer seniority retroactive to the date of the alleged discrimination." *Ante*, at 220. In my view, the Court simply and completely misstates the issue. The question before us is not which of two inflexible standards should govern accrual of backpay liability in *all* Title VII cases, but whether the District Court's award of backpay relief to Gaddis and Starr *in this case* constituted an abuse of discretion.

The Court makes frequent and puzzling reference to the "onerous burden[s]" and "sacrifice demanded by the lower court's rule." *Ante*, at 239, 240. See also *ante*, at 227 ("the lower court's rule"); *ante*, at 229 ("[t]he rule adopted by the court below"); *ibid.* ("the Court of Appeals' rule"); *ante*, at 230, n. 12 ("the rule applied by the court below"); *ante*, at 238 ("[t]he rule . . . adopted by the court below"); *ante*, at 241 ("the rule adopted by the court below"). In fact, the Court of Appeals adopted no inflexible "rule" at all. Rather, it simply applied the well-settled and flexible principles of appellate review of Title VII remedies prescribed in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), and *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976).

In *Albemarle*, this Court directed that, in most Title VII matters, "the standard of [appellate] review will be the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case," 422 U. S., at 424 (citation omitted). With regard to Title VII backpay relief, however, the Court specified that "'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Id.*, at 418, quoting *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965). To achieve this purpose, "Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice.'" 422 U. S., at 418 (citation omitted).[1]

---

[1] In passing the Equal Employment Opportunity Act of 1972, 86 Stat. 103, Congress specifically rejected several legislative efforts to limit the judicial power to award backpay. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 420 (1975). The Section-by-Section Analysis accompanying the Conference Committee Report reaffirmed the "make whole" purpose of § 706(g), Title VII's backpay provision:

"The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972), quoted in *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 421.

The Court in *Albemarle* and *Franks* made clear that, in Title VII cases, the equitable discretion of district courts should be guided by a heavy presumption in favor of full backpay awards. "Rather than limiting the power of district courts to do equity, the presumption insures that complete equity normally will be accomplished." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 786 (POWELL, J., concurring in part and dissenting in part). By exercising their discretion to award full backpay relief, district courts further two broad purposes underlying Title VII. First, "the reasonably certain prospect of a backpay award . . . 'provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges'" of discrimination. *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 417–418 (citation omitted). Second, backpay awards "make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418.

Thus, the goal of appellate review is to ensure that the district courts have exercised their remedial discretion in the way that "allow[s] the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 770–771. "The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with [Title VII's] twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 421–422.

B

In this case, the trial court's findings of fact were uncontroverted. In July 1971, Judy Gaddis and Rebecca Starr sought jobs at petitioner Ford's automotive parts warehouse in Charlotte, N. C. "Because of their experience, each was qualified to work at Ford as a 'picker-packer.'" App. to

Pet. for Cert. A–159 (District Court's Findings of Fact). Ford's stated hiring practice was to fill job vacancies at the warehouse by "taking the earliest filed applications first," and selecting employees by interviewing qualified candidates. *Id.*, at A–157. At the time Gaddis and Starr applied, however, Ford had never hired any woman to work at the warehouse.[2] *Id.*, at A–167—A–168. When Gaddis and Starr received their application forms, "a receptionist at Ford . . . told them in substance that Ford did not hire women to work in the warehouse." *Id.*, at A–159.

Despite Gaddis' persistent requests for job interviews, petitioner interviewed neither woman immediately, supposedly because no job vacancy existed. *Id.*, at A–160—A–161. The unit supervisor testified: "Ms. Gaddis called me on several occasions and asked if I was hiring, and I said no, . . . I just have too much work to do to sit down and interview people if I'm not hiring." App. 31. Shortly thereafter, however, in August 1971, Ford hired male applicants to fill four job openings. App. to Pet. for Cert. A–159—A–160. "At least two of the men . . . were offered their jobs *after* Gaddis and Starr applied." *Id.*, at A–160 (emphasis in original).

Gaddis filed a sex discrimination charge with respondent EEOC in September 1971. *Id.*, at A–154. In January 1973, Gaddis and Starr were recalled to jobs at a nearby General Motors warehouse. In July 1973, petitioner made a vague job offer first to Gaddis, then to Starr.[3] The District Court found as a fact that "[t]he offer to the two women was made after Ford learned that a charge of sex discrimination had been filed with the Commission (and was prompted by a desire to bring some women into the warehouse in response to the charge)." *Id.*, at A–162—A–163.[4]

---

[2] The District Court found, for example, that the job application of Zettie Smith, who sought employment at Ford about a month before Gaddis and Starr, and who was the first woman to apply for a warehouse job there, "was never seriously considered because she is a woman." App. to Pet. for Cert. A–157—A–158.

[3] At trial, Gaddis was asked:

"Q. Did [the clerk to the warehouse manager] say that the job was being offered to you, or did he discuss simply with you, in the form of an interview, the possibility of hiring you into some job?

"A. It was so vague that I couldn't pinpoint anything down. They never did say what type of work it would be, whether it would be [parts]

Gaddis, and then Starr, turned down petitioner's job offer. The District Court found that the offer was "refused by both women since they were at that time back at work in the General Motors warehouse, having been recalled to work in Janu-

---

picking or whether it would be in sheet metal or whether it would be putting up stock or whether it would be on a day shift or night shift, whether it was a permanent or temporary job. At the time, I had a good seniority with General Motors and I had a secure job, and so on those grounds, I refused it." App. 43.

Similarly, Starr testified on cross-examination:

"I remember [the clerk to the warehouse manager] wasn't specific on the job about what it would be. I did have, at General Motors I had fifteen, I don't know if it was fourteen or fifteen people under me. I had seniority, and I also, this is the truth about [it,] I was scared. Whenever I had worked at Ford before, I had been badgered and I don't know, I was just, I wanted to look into the job. Yet, I had a fear to go back. I didn't know what I would be facing." *Id.*, at 54.

[4] The trial testimony of Ford's warehouse operations manager illuminates petitioner's motives:

"Q. Whose decision was it to call Ms. Gaddis and Ms. Starr?

"A. It was my decision.

"Q. Why?

"A. Well, mainly because we had a suit, EEOC suit filed against us, and we wanted to give one of them an opportunity to go to work for us, and we only had one, maybe two openings at that time.

* * * * *

"Q. Mr. Ely, you indicated in your testimony that you offered a job to one of the women, either Ms. Gaddis or Ms. Starr, in July, 1973. Is that correct?

"A. Yes, that's correct.

"Q. You also stated that you offered such job because of the EEOC charge which had been filed against Ford Motor Company. Is that correct?

"A. That's correct." *Id.*, at 17–18.

ary, 1973. Neither woman wished to lose accrued seniority at General Motors and neither wanted to be the only woman employed in the Ford warehouse." *Id.*, at A–163.

Based on its factual findings, the District Court concluded as a matter of law that "Ford discriminated against . . . Gaddis and Starr on the basis of their sex by failing to employ them in its warehouse in the positions filled in August, 1971." *Id.*, at A–167. In rulings not contested here, the District Court also found that 10 other women had established prima facie cases of unlawful sex discrimination by Ford. *Id.*, at A–168.

To determine the backpay remedy to which Gaddis and Starr were entitled, the District Court attached no legal significance to the women's decision to decline beginning employment at Ford nearly two years after they unlawfully had been denied those same jobs and six months after they had begun accumulating seniority elsewhere.[5] In the ruling which the Court today implicitly deems an abuse of discretion, the District Court held that "[b]ack pay due to Gaddis and Starr shall not be affected by their refusal to accept the single position offered them in July, 1973, inasmuch as neither would have been confronted by that decision and its implications had both been hired in August, 1971." *Id.*, at A–170—A–171.

Applying the standard of review specified in *Franks, supra*, and *Albemarle, supra*, the Court of Appeals, 645 F. 2d, at 200, affirmed "the district court's decision as a proper exercise of discretion founded on not clearly erroneous factual determinations." *Id.*, at 201. In particular, the Court of Appeals found no abuse of discretion in the District Court's failure to terminate the backpay awards in July 1973.[6]

---

[5] The District Court applied two equitable principles to shape relief in this case. It first concluded that an award of all backpay accruing after August 1971 would make Gaddis and Starr whole. The District Court therefore reconstructed a probable employment history at Ford for each woman, calculating what each would have received but for petitioner's unlawful discrimination. Second, the court obliged Gaddis and Starr to take all reasonable steps to mitigate damages. Accordingly, it subtracted from the backpay awards any amounts Gaddis and Starr actually earned or reasonably could have earned after August 1971. App. to Pet. for Cert. A–170.

The Court of Appeals rested its narrow ruling on two key facts: that "Gaddis and Starr could accept [Ford's] offer only by *forfeiting the seniority* they had accumulated at General Motors and *without a compensating offer of seniority at Ford* to alleviate the effects of the discrimination against them in 1971." *Id.*, at 192. (Emphasis added.) The court expressed no view as to whether Ford's backpay liability would have been tolled if Gaddis and Starr could have accepted Ford's job offer without forfeiting seniority accumulated elsewhere. Nor did the Court of Appeals decide whether the women would have been obliged to accept Ford's offer had it encompassed *some* compensating offer of seniority, short of full retroactive seniority.

Contrary to this Court's suggestion today, the Court of Appeals announced no general *rule* that an employer's "backpay liability should be tolled *only* by the rejection of an offer that includes seniority retroactive to the date on which the alleged discrimination occurred." *Ante*, at 228 (emphasis added). The Court of Appeals merely refused to announce a broad new rule, urged by Ford, requiring victims of Title VII discrimination to "accept job offers which include a loss of seniority in order to preserve their back pay rights." 645 F. 2d, at 192. Such an inflexible approach, the court decided, would frustrate Title VII's central purposes by permitting employers to present discriminatees with an "intolerable choice."[7] *Ibid.*

---

[6] "[T]he district court reached an eminently reasonable result. It did not permit Ford to cut off the back pay period by making Gaddis and Starr an incomplete and unacceptable offer, and it denied Gaddis and Starr a double recovery by deducting their General Motors wages from their back pay awards." 645 F. 2d, at 193.

II

The Court today accepts Ford's invitation, wisely declined by the Court of Appeals, and adopts its broad new rule governing awards of backpay relief in Title VII cases: henceforth, "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability."[8] *Ante*, at 241. This ruling is disturbing in four respects.

First: The Court's new rule is flatly inconsistent with *Albemarle*'s unambiguous directive "that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U. S., at 421. Applied generally, the Court's rule interferes with both objectives.

The Court's approach authorizes employers to make "cheap offers" to the victims of their past discrimination. Employers may now terminate their backpay liability unilaterally by extending to their discrimination victims offers they cannot reasonably accept. Once an employer has refused to hire a job applicant, and that applicant has mitigated damages by obtaining and accumulating seniority in another job, the employer may offer the applicant the same job that she was denied unlawfully several years earlier. In this very case, for example, Ford offered Gaddis and Starr jobs only after they had obtained employment elsewhere and only because they had filed charges with the EEOC. If, as here, the applicant declines the offer to preserve existing job security, the employer has successfully cut off all future backpay liability to that applicant. By insulating a discriminating employer from proper liability for his discriminatory acts, the Court's rule reduces his "incentive to shun practices of dubious legality," *id.*, at 417, and hinders the eradication of discrimination.

---

[7] "[I]f Gaddis and Starr rejected Ford's offer and stayed at General Motors, they would forego their rights to further back pay benefits. On the other hand, if they accepted the job offered by Ford, which they had not held for the previous two years because of Ford's discriminatory hiring policy, they would lose their seniority rights at General Motors." *Id.*, at 192.

[8] The Court's explanation for its misreading of the Court of Appeals' decision is that the United States District Court for the Western District of Virginia has interpreted that decision as stating a somewhat different proposition. See *ante*, at 227, n. 10. But if one District Court in the Fourth Circuit has misconstrued the Fourth Circuit's opinion, surely that is a matter properly to be corrected by the United States Court of Appeals for the Fourth Circuit. This Court is not entitled to transform a narrow Court of Appeals ruling into a broad one, just so that it may reverse and install a broad new rule of its own choosing.

The Court's rule also violates Title VII's second objective—making victims of discrimination whole. Again, the rule's anomalies are well illustrated by the facts of this case. Had petitioner not discriminated against Gaddis and Starr, both would have begun to work at Ford in August 1971. By July 1973, both would have accumulated nearly two years of seniority. Because of Ford's discrimination, however, each experienced long periods of unemployment and temporary employment before obtaining jobs elsewhere.[9] The District Court therefore determined that only full backpay awards, mitigated by wages earned or reasonably earnable elsewhere, would make Gaddis and Starr whole.

This Court now truncates those awards simply because Gaddis and Starr refused to accept Ford's offers of beginning employment in 1973. Yet even if Gaddis and Starr had accepted those offers, they would not have been made whole. Deprived of two years of seniority, Gaddis and Starr would have enjoyed lesser health, life, and unemployment insurance benefits, lower wages, less eligibility for promotion and transfer, and greater vulnerability to layoffs than persons hired after they were unlawfully refused employment. See Tr. of Oral Arg. 30; Brief for Respondent 17. Even if Gaddis and Starr had continued to litigate the question of their retroactive seniority after accepting Ford's offer, they still would have spent many years at Ford "subordinate to persons who, but for the illegal discrimination, would have been[,] in respect to entitlement to [competitive seniority] benefits[,] [their] inferiors." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 768.

---

[9] Gaddis, for example, sought employment in South Carolina "at various parts places, independent part places, car dealers, such as Chrysler-Plymouth, the Ford place which was Lewis Ford at that time, all the car dealers, . . . some of the hosiery mills, . . . [and] Radiator Specialty Company," 3 Tr. 362, before obtaining her job at General Motors.

The Court claims that its new rule "powerfully motivates employers to put Title VII claimants to work, thus ending ongoing discrimination as promptly as possible." *Ante*, at 230. In fact, the discrimination is not ended, because a discrimination victim who accepts a "cheap offer" will be obliged to work at a seniority disadvantage, and therefore will suffer ongoing effects from the employer's discriminatory act. The Court also alleges that its rule promotes "cooperation and voluntary compliance" with Title VII by giving both employers and claimants incentives to make and accept "unconditional" job offers. *Ante*, at 228–229. If the Court's rule furthers this end, however, it does so only by weakening the bargaining position of a claimant vis-à-vis the employer. Discrimination victims will be forced to accept otherwise unacceptable offers, because they will know that rejection of those offers truncates their backpay recovery. A rule that shields discriminating employers from liability for their past discrimination and coerces bona fide Title VII claimants to accept incomplete job offers is fundamentally incompatible with the purposes of Title VII.

Second: The Court's rule unjustifiably limits a district court's discretion to make individual discrimination victims whole through awards of backpay. The Court suggests that, "absent special circumstances," a district court abuses its discretion *per se* if it fails to terminate an employer's backpay liability at the point where that employer has extended an unconditional job offer to a discrimination claimant. Yet "[i]n *Albemarle Paper* the Court read Title VII as creating a *presumption in favor* of backpay." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 786 (POWELL, J., concurring in part and dissenting in part) (emphasis added).[10] *Franks* supplied "emphatic confirmation that federal courts are empowered to fashion such relief as the *particular circumstances of a case may require* to effect restitution, making whole insofar as possible the victims of . . . discrimination in hiring." *Id.*, at 764 (opinion of the Court) (emphasis added).

The Court recognizes that its new rule interferes with district court discretion to make complete backpay awards in individual cases. Thus, the Court expressly preserves the principle of appellate deference to the "sound discretion" of the trial court in "exceptional circumstances." *Ante*, at 238–239, n. 27. Yet, curiously, the Court offers no explanation why the facts of this very case fail to satisfy its own "exceptional circumstances" test.[11] Given the Court's concession that district courts must retain their discretion to make bona fide Title VII claimants whole in some cases, I see no advantage in prescribing a blanket rule that displaces that discretion in other cases where complete relief is equally justified.

---

[10] The Court cites language from *Albemarle* suggesting that a district court's discretion is not limitless. See *ante*, at 226–227. But the Court conspicuously omits *Albemarle*'s clear statement that if Congress intended to limit the equitable discretion of district courts in any way, it did so only by leaving "'little room for the exercise of discretion *not* to order reimbursement.'" See *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 417, quoting *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U. S. 288, 296 (1960) (emphasis added).

[11] The Court suggests, for example, that if a hypothetical Title VII "claimant has been forced to move a great distance to find a replacement job, a rejection of the employer's offer might reflect the costs of relocation more than a judgment that the replacement job was superior, all things considered, to the defendant's job." *Ante*, at 238, n. 27. For Gaddis and Starr, however, the loss of their accumulated seniority at their replace-

Third: I am disturbed by the Court's efforts to justify its rule by relying on situations not presented by this case. For example, the Court partially rests its rule on an "unemployed or underemployed claimant's statutory obligation to minimize damages" by accepting an unconditional job offer without seniority. *Ante*, at 234. Because Gaddis and Starr were fully employed when Ford finally offered them jobs, however, neither the District Court nor the Court of Appeals exempted unemployed or underemployed victims of discrimination from accepting offers like Ford's.[12] Similarly, the Court analyzes the hypothetical case of a Title VII claimant who "has had the good fortune to find a more attractive job than the defendant's." *Ibid.* But, as the Court later recognizes, there is no assurance that the present case fits this category either. After speculating at length about how Gaddis and Starr may have valued the relative worth of their Ford and General Motors jobs, see *ante*, at 234–236, the Court finally acknowledges that on this paper record, "[w]e cannot infer" how much Gaddis and Starr "valued their GM jobs . . . solely from their rejection of Ford's offer." *Ante*, at 235, n. 24.

---

ment jobs certainly reflected "costs of relocation" at least as substantial as high moving expenses.

I expect that federal courts will find no meaningful distinction between a worker's refusal to accept a job offer because he believes that acceptance would force him to incur costs, and a similar refusal based on the worker's judgment that changing jobs would prove costly. In either case, for purposes of awarding Title VII relief, the reasonableness of the worker's refusal should be left to the trial court's discretion.

[12] The purpose of § 706(g)'s "mitigation of damages" requirement is to encourage claimants to work while their Title VII claims are being adjudicated. The Court cannot deny that Gaddis and Starr fully mitigated damages by seeking and obtaining other employment while litigating their claims against Ford.

Equally unconvincing is the Court's repeated invocation of, and preoccupation with, "the rights of 'innocent third parties,'" *ante*, at 239, and the "disruption of the existing seniority system[s]," *ante*, at 229, that would result from adoption of the Court of Appeals' "rule." The Court nowhere demonstrates how *petitioner's* labor relations would have suffered had it extended offers of retroactive seniority to Gaddis and Starr. The details of Ford's collective-bargaining agreement were not litigated in either the District Court or the Court of Appeals. See Tr. of Oral Arg. 30–31. Thus, those courts never passed on petitioner's obligation to offer retroactive seniority to Gaddis and Starr if such an offer would have disrupted its labor relations or existing seniority systems.[13] Nor did the Court of Appeals decide, as a general matter, whether or not offers of retroactive seniority to discrimination claimants adversely affect the rights of incumbent employees.[14] The Court cannot justify reversal in the

---

[13] The Court of Appeals did not foreclose the possibility that Ford could have terminated its backpay liability to Gaddis and Starr by offering them employment plus an award of *provisional* seniority, defeasible in the event that they lost their continuing lawsuit for backpay. Nor did the Court of Appeals deny that offering a job without seniority might terminate Ford's backpay liability, should any provision of Ford's collective-bargaining agreement preclude it from making offers of retroactive seniority. Had petitioner pointed to such a collective-bargaining agreement provision, or proved that its incumbent employees actually had objected to offers of retroactive seniority to Title VII claimants, the Court of Appeals would have considered those factors in determining whether the District Court abused its discretion in shaping Gaddis' and Starr's relief.

[14] In any event, the Court's claim that offers of retroactive seniority would injure the rights of incumbent employees is vastly overstated. If an employer sued by a Title VII claimant could toll the accrual of backpay liability by making a unilateral offer that included some form of retroactive seniority, he still would have every incentive to make such an offer as soon as possible after the discriminatory act. The amount of retroactive seniority offered would necessarily be small, and the seniority rights of relatively few incumbent employees would be affected.

Under the Court's approach, in contrast, employers will no longer have any incentive to offer retroactive seniority. Any awards of retroactive se-case at hand by vague reference to classes of claimants and third parties who are not before the Court. To the extent that it seeks to do so, its intricate argument is both irrelevant and advisory.

Fourth and finally: I am struck by the contrast between the Court's concern for parties who are not here and its studied indifference to the real-life concerns of the parties whose interests are directly affected. When the Court finally confronts the choice that actually faced Gaddis and Starr, *ante*, at 236–239, it blithely suggests that "[a]fter all, they had the option of accepting Ford's unconditional offer and retaining the right to seek full compensation at trial" in the form of retroactive seniority. *Ante*, at 237. Yet the Court earlier acknowledges that "[d]elays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them." *Ante*, at 228.

"If the choice presented to Gaddis and Starr was difficult," the Court continues, "it was only because it required them to assess their likelihood of prevailing at trial." *Ante*, at 238. Without consulting the record, the Court then states:

> "Gaddis and Starr presumably rejected Ford's offer because they thought their jobs at GM were worth more to them than full compensation (Ford's offer plus a court award) discounted by the risks of litigation. . . . Had they known they were going to win [their lawsuit], of course, they would have rejected the Ford job only if they valued the GM jobs more than they valued the combination of Ford's job plus the value of court-ordered

---

niority to bona fide Title VII claimants will thus be court-ordered, and will be entered only after "the lengthy delays that too often attend Title VII litigation." *Ante*, at 221. By delaying awards of retroactive seniority until final judgment in a significant number of cases, the Court's approach ensures that the seniority rights of comparatively greater numbers of incumbent employees will be affected adversely.

> compensation *un*discounted by the risks of litigation." *Ante*, at 237, n. 26 (emphasis in original).

This is a comfortable rationale stated from the sidelines. Unfortunately, the abstract and technical concerns that govern the Court's calculations bear little resemblance to those that actually motivated Judy Gaddis and Rebecca Starr. When asked on cross-examination why she had turned down Ford's 1973 offer, Gaddis testified: "I had seniority [at General Motors] and I knew that I wasn't in danger of any layoff, where if I had accepted the job at Ford *I might have worked a week or two weeks and been laid off because I would have been low seniority*." App. 47 (emphasis added). Similarly, Starr testified on cross-examination: "I had seniority at General Motors. I had about fifteen people working under me. *I could go to work at Ford and work a week and I knew that they could lay me off*." 4 Tr. 365–366 (emphasis added).

To a person living in the real world, the value of job security today far outstrips the value of full court-ordered compensation many years in the future. The Court's elaborate speculation about the concerns that "presumably" motivated Gaddis and Starr nowhere recognizes what a Ford job without seniority actually meant to Gaddis and Starr—a job from which they could be laid off at any moment. Unlike the Court, Gaddis and Starr recognized that if they traded their jobs with seniority for jobs without seniority, they could quickly become unemployed again, long before they had the chance to vindicate their rights at trial.

To people like Gaddis and Starr, the knowledge that they might someday establish their Title VII claims on the merits provides little solace for their immediate and pressing personal needs. Starr's trial testimony reveals just how much job security meant to her:

> "It was just a couple of days after I had [started working] there [at a temporary job] and this is, I was just wanting that job so bad because you can't, a woman,

> when you've got three children, I needed the money, and I was wanting the job so bad. I worked so hard. I'll never forget one day when [the unit supervisor] came to me. I'll never forget that, and he said, I had just been there a few days, I'll have to let you go. . . . It broke my heart because I knew I had worked so hard." *Id.*, at 356.[15]

I agree with the Court that "the victims of job discrimination want jobs, not lawsuits." *Ante*, at 230. See also, *ante*, at 221 ("The claimant needs work that will feed a family and restore self-respect. A job is needed—now"). When Ford made its 1973 offers to Gaddis and Starr, however, they *had* jobs, in which they had accumulated seniority despite Ford's discrimination. I therefore cannot accept the Court's conclusion that these women should have traded those jobs for uncertain employment in which back seniority could be won only by lawsuit. Nor can I justify penalizing Gaddis and Starr because they "discounted" the ultimate likelihood of obtaining court-ordered retroactive seniority at a different rate than the Court does today.

After hearing all the witnesses and appraising all the evidence, the District Court exercised its equitable discretion to shape complete backpay relief for Gaddis and Starr. In light of all the circumstances, the District Court refused to penalize Gaddis and Starr for declining Ford's 1973 job offer. Applying the correct standard of review over Title VII remedies, the Court of Appeals concluded that the District Court had exercised its remedial discretion properly. Sitting at this remove, I cannot say that Gaddis and Starr acted unreasonably. I would affirm the judgment of the Court of Appeals and thereby, for these two victims of discrimination, fulfill, and not defeat, the promise of Title VII.

---

[15] Without embarrassment, the Court cites Rebecca Starr's testimony to support its argument that the Court of Appeals' "rule," and not its own new rule, is indifferent to the real-life concerns of victims of sex discrimination. See *ante*, at 230, n. 12. Under the Court of Appeals' "rule," however, Rebecca Starr was awarded full backpay as compensation for Ford's sex discrimination. Under this Court's rule, a large portion of Starr's compensation will simply be cut off. By claiming that the Court of Appeals was somehow *more* indifferent to Starr's real-life concerns, the Court only confirms how far removed from the real world it is.

MICHIGAN *v.* THOMAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 81–593. Decided June 28, 1982

After the police had stopped respondent's automobile for a traffic violation, respondent, who was riding as a passenger, was arrested for possession of open intoxicants, and the driver was issued a citation for not having a driver's license. An inventory search of the car was made before it was towed, disclosing marihuana in the unlocked glove compartment and, upon a more thorough search, a loaded revolver in an air vent under the dashboard. Respondent was convicted in a Michigan state court for possession of a concealed weapon. The Michigan Court of Appeals reversed, holding that the warrantless search of respondent's automobile violated the Fourth Amendment.

Held: There was no violation of respondent's Fourth Amendment rights by the warrantless search. When police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. *Chambers* v. *Maroney*, 399 U. S. 42; *Texas* v. *White*, 423 U. S. 67. Here, once the inventory search of the glove compartment revealed contraband, the warrantless search was properly expanded to include the air vents without any showing of "exigent circumstances."

Certiorari granted; 106 Mich. App. 601, 308 N. W. 2d 170, reversed and remanded.

PER CURIAM.

While respondent was the front-seat passenger in an automobile, the car was stopped for failing to signal a left turn. As two police officers approached the vehicle, they saw respondent bend forward so that his head was at or below the level of the dashboard. The officers then observed an open bottle of malt liquor standing upright on the floorboard between respondent's feet, and placed respondent under arrest for possession of open intoxicants in a motor vehicle. The 14-year-old driver was issued a citation for not having a driver's license. Respondent claimed ownership of the car.

Respondent and the driver were taken to the patrol car, and a truck was called to tow respondent's automobile. One of the officers searched the vehicle, pursuant to a departmental policy that impounded vehicles be searched prior to being towed. The officer found two bags of marihuana in the unlocked glove compartment. The second officer then searched the car more thoroughly, checking under the front seat, under the dashboard, and inside the locked trunk. Opening the air vents under the dashboard, the officer discovered a loaded, .38-caliber revolver inside.

Respondent was convicted of possession of a concealed weapon. He moved for a new trial, contending that the revolver was taken from his car pursuant to an illegal search and seizure; the trial court denied the motion.

The Michigan Court of Appeals reversed, holding that the warrantless search of respondent's automobile violated the Fourth Amendment. 106 Mich. App. 601, 308 N. W. 2d 170 (1981). The court acknowledged that in *South Dakota* v. *Opperman*, 428 U. S. 364 (1976), this Court upheld the validity of warrantless inventory searches of impounded motor vehicles. Moreover, the court found that, since respondent had been placed under arrest and the other occupant of the car was too young to legally drive, it was proper for the officers to impound the vehicle and to conduct an inventory search prior to its being towed. However, in the view of the Court of Appeals, the search conducted in this case was "unreasonable in scope," because it extended to the air vents which, unlike the glove compartment or the trunk, were not a likely place for the storage of valuables or personal possessions. 106 Mich. App., at 606, 308 N. W. 2d, at 172.

The Court of Appeals also rejected the State's contention that the scope of the inventory search was properly expanded when the officers discovered contraband in the glove compartment. The court concluded that, because both the car and its occupants were already in police custody, there were no "exigent circumstances" justifying a warrantless search for contraband.[1]

We reverse. In *Chambers* v. *Maroney*, 399 U. S. 42 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in *Texas* v. *White*, 423 U. S. 67 (1975). See also *United States* v. *Ross*, 456 U. S. 798, 807, n. 9 (1982). It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.[2] See *ibid.*

Here, the Court of Appeals recognized that the officers were justified in conducting an inventory search of the car's glove compartment, which led to the discovery of contraband. Without attempting to refute the State's contention that this discovery gave the officers probable cause to believe there was contraband elsewhere in the vehicle, the Court of Appeals held that the absence of "exigent circumstances" precluded a warrantless search. This holding is plainly inconsistent with our decisions in *Chambers* and *Texas* v. *White*.

---

[1] The Court of Appeals did not directly address the State's contention that the discovery of marihuana in the glove compartment provided probable cause to believe there was contraband hidden elsewhere in the vehicle. However, the court apparently assumed that the officers possessed information sufficient to support issuance of a warrant to search the automobile; the court's holding was that the officers were required to obtain such a warrant, and could not search on the basis of probable cause alone. See 106 Mich. App., at 606–608, 308 N. W. 2d, at 172–173.

[2] Even were some demonstrable "exigency" a necessary predicate to such a search, we would find somewhat curious the Court of Appeals' conclusion that no "exigent circumstances" were present in this case. Unlike the searches involved in *Chambers* v. *Maroney*, 399 U. S. 42 (1970), and *Texas* v. *White*, 423 U. S. 67 (1975)—which were conducted at the station house—the search at issue here was conducted on the roadside, before the car had been towed. As pointed out by Judge Deneweth, in dissent, "there was a clear possibility that the occupants of the vehicle could have had unknown confederates who would return to remove the secreted contraband." 106 Mich. App., at 609, 308 N. W. 2d, at 174.

The petition for certiorari and the motion of respondent to proceed *in forma pauperis* are granted, the judgment of the Michigan Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BRENNAN and JUSTICE MARSHALL would grant the petition for a writ of certiorari and set the case for oral argument.

UNITED STATES *v.* HOLLYWOOD MOTOR CAR CO., INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-1144. Decided June 28, 1982

After respondents, originally indicted on two federal criminal counts in the Eastern District of Kentucky, obtained a change of venue to the Central District of California, the Government secured a superseding indictment which added four new counts. The Government then obtained a voluntary dismissal of three of the counts (including one of the original counts), and respondents moved to dismiss the remaining counts on the ground that the superseding indictment manifested prosecutorial vindictiveness in retaliation for their exercising their right to a change of venue, and thus ran afoul of the rule announced in *Blackledge* v. *Perry*, 417 U. S. 21. The District Court denied the motion but stayed the trial to permit an appeal. The Court of Appeals held that the denial of the motion to dismiss was immediately appealable as a "final decision" under 28 U. S. C. § 1291, and that respondents had established a case of prosecutorial vindictiveness requiring dismissal of the superseding indictment.

Held: The Court of Appeals was without jurisdiction under 28 U. S. C. § 1291 to review the District Court's interlocutory order refusing to dismiss the indictment. The policy embodied in § 1291 is inimical to piecemeal appellate review of trial court decisions that do not terminate the litigation, and this policy is at its strongest in the field of criminal law. Respondents' claim of prosecutorial vindictiveness does not fall within the narrow group of claims coming within the "collateral order" exception to § 1291's rule of finality. *Stack* v. *Boyle*, 342 U. S. 1; *Abney* v. *United States*, 431 U. S. 651; and *Helstoski* v. *Meanor*, 442 U. S. 500, distinguished. A claim of prosecutorial vindictiveness does not meet the test under such exception of being "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468. Cf. *United States* v. *MacDonald*, 435 U. S. 850.

Certiorari granted; 646 F. 2d 384, reversed.

PER CURIAM.

Respondents, originally indicted in the Eastern District of Kentucky on two counts for violations of 18 U. S. C. §§ 371 and 545, succeeded in obtaining a change of venue to the Central District of California. In the latter District, the Government secured a superseding indictment charging four new substantive counts of making false statements to customs officers in violation of 18 U. S. C. § 542, in addition to the two original counts. The Government then obtained a voluntary dismissal of the original conspiracy count and two of the false-statement counts. Respondents moved to dismiss the remaining counts on the ground that the superseding indictment manifested prosecutorial vindictiveness and therefore ran afoul of the rule announced in *Blackledge* v. *Perry*, 417 U. S. 21 (1974). The District Court denied respondents' motion, but stayed the commencement of trial to permit an appeal. The Court of Appeals for the Ninth Circuit held "that the denial of a motion to dismiss based on the ground of vindictive prosecution is immediately appealable as a final decision under 28 U. S. C. § 1291." 646 F. 2d 384, 386 (1981).[1] In reaching this holding the Court of Appeals relied on its prior decisions in *United States* v. *Burt*, 619 F. 2d 831 (1980), and *United States* v. *Griffin*, 617 F. 2d 1342, cert. denied, 449 U. S. 863 (1980). Reaching the merits, the court held that respondents had established a case of prosecutorial vindictiveness requiring dismissal of the superseding indictment. The United States then sought review in this Court.

We do not reach the question of prosecutorial vindictiveness, for we hold that the Court of Appeals was without jurisdiction under 28 U. S. C. § 1291 to review the District Court's interlocutory order refusing to dismiss the indictment. Congress has limited the jurisdiction of the Courts of Appeals to "final decisions of the district courts."

---

[1] The rule in the Ninth Circuit directly conflicts with that adopted by the Courts of Appeals for the District of Columbia and Fifth Circuits. Those courts have held that claims of prosecutorial vindictiveness may not be aired in interlocutory appeals. *United States* v. *Brizendine*, 212 U. S. App. D. C. 169, 659 F. 2d 215 (1981); *United States* v. *Gregory*, 656 F. 2d 1132 (CA5 1981).

28 U. S. C. § 1291. This Court has long held that the policy of Congress embodied in this statute is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation, and that this policy is at its strongest in the field of criminal law:

> "The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment. . . . This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases. See *Cobbledick* v. *United States*, 309 U. S. 323, 324–326." *DiBella* v. *United States*, 369 U. S. 121, 124 (1962).

This Court has interpreted the jurisdictional statute to permit departures from the rule of finality in only a limited category of cases falling within the "collateral order" exception delineated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545–547 (1949). Such orders "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978). In criminal cases, we have adhered to the collateral order exception to the rule of finality on three occasions: present in each of these cases were factors noticeably lacking in the instant appeal.

In *Stack* v. *Boyle*, 342 U. S. 1 (1951), the Court held that an order denying a motion to reduce bail could be reviewed before trial. Writing separately, Justice Jackson (the author of *Cohen*) recognized that "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all."

342 U. S., at 12. In *Abney* v. *United States*, 431 U. S. 651 (1977), we permitted interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds. Perhaps most important among the relevant factors, we recognized that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.*, at 660. One right guaranteed by the Double Jeopardy Clause was the right not to be tried twice for the same offense. "[I]f a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.*, at 662 (emphasis in original). Finally, in *Helstoski* v. *Meanor*, 442 U. S. 500 (1979), we held that a United States Congressman could have taken an interlocutory appeal in a criminal case to assert the immunity conferred upon him by the Speech or Debate Clause of the Constitution. Crucial to the holding was our view that the Speech or Debate Clause protected Congressmen "'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Id.*, at 508, quoting *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967). The right protected by the Clause would have been lost if the appeal had been postponed.

Each of these cases, in addition to satisfying the other requirements of *Cohen*, involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States* v. *MacDonald*, 435 U. S. 850, 860 (1978). Our holding in *United States* v. *MacDonald* underscores the significance of this feature. The issue in *MacDonald* was whether a defendant could appeal, prior to trial, a District Court's order denying his motion to dismiss the indictment because of an alleged violation of his

Sixth Amendment right to a speedy trial. In concluding that such an appeal was not authorized by 28 U. S. C. § 1291, we noted:

> "There perhaps is some superficial attraction in the argument that the right to a speedy trial . . . must be vindicated before trial in order to insure that no nonspeedy trial is ever held. Both doctrinally and pragmatically, however, this argument fails. Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. . . . Proceeding with the trial does not cause or compound the deprivation already suffered." *Id.*, at 860–861.

Respondents assert that their claim of prosecutorial vindictiveness, based on the modification of the original indictment in retaliation for their exercise of a right to move for change of venue, is analogous to the three instances in which we have allowed appeal in criminal cases under the collateral order doctrine. But we think that their claim is more analogous to the speedy trial claim which we held unreviewable under the collateral order doctrine in *United States* v. *MacDonald*, *supra*. We think that it particularly fails the third part of the test for *Cohen* appeals articulated in *Coopers & Lybrand*, *supra*, that the claim "be effectively unreviewable on appeal from a final judgment."

Blackledge v. *Perry*, 417 U. S. 21 (1974), on which respondents base the merits of their claim of vindictive prosecution, was an application of the principles announced in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), to conduct on the part of a prosecutor. In *Perry* the defendant had been convicted in a state court of limited jurisdiction, and had exercised his statutory right to a *de novo* appeal to the state court of general jurisdiction. Prior to the commencement of the latter trial, the prosecutor obtained an indictment charging the defendant with crimes more severe than those for which he was initially convicted. Because the facts suggested "a realistic likelihood of 'vindictiveness,'" 417 U. S., at 27, we deemed it necessary to apply the "prophylactic rule of *Pearce*," *id.*, at 26, in order to discourage retaliation by the State for the defendant's exercise of his procedural right.

Although there is language in the *Perry* opinion suggesting that the defendant possessed a "right not to be haled into court at all" upon the more serious charge, *id.*, at 30, it is clear that the Court was not using this language to indicate that he was entitled to be free of any retrial whatever. We stated in *Perry* that "[w]hile the Due Process Clause of the Fourteenth Amendment bars trial of Perry on the felony assault charges in the Superior Court, North Carolina is wholly free to conduct a trial *de novo* in the Superior Court on the original misdemeanor assault charge." *Id.*, at 31, n. 8. The defendant in *Perry* was fully protected by postconviction relief, leading to a new trial free of the taint of vindictiveness.

Obviously, it is wholly desirable to correct prior to trial any substantive errors noticed at that time. It is equally evident that when relief must await postconviction proceedings, the defendant is subjected to the burden of defending himself at trial, even though the presence of errors might require reversal of his conviction and possibly a second trial. Nevertheless, reversal of the conviction and, where the Double Jeopardy Clause does not dictate otherwise, the provision of a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused.[2]

---

[2] Noting that "encouragement of delay is fatal to the vindication of the criminal law," this Court has observed that "[b]earing the discomfiture and

As we noted in *United States* v. *MacDonald,* 435 U. S., at 860, n. 7:

> "Admittedly, there is value—to all but the most unusual litigant—in triumphing before trial, rather than after it, regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial."

Even when the vindication of the defendant's rights requires dismissal of charges altogether, the conditions justifying an interlocutory appeal are not necessarily satisfied. In *MacDonald,* for example, we declined to permit a defendant whose speedy trial motion had been denied before trial to obtain interlocutory appellate review, despite our recognition that "an accused who does successfully establish a speedy trial claim before trial will not be tried." *Id.,* at 861, n. 8. The nature of the speedy trial right was such that "[p]roceeding with the trial does not cause or compound the deprivation already suffered." *Id.,* at 861. This holding reflects the crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges. See *id.,* at 860, n. 7. The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not.

---

cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States,* 309 U. S. 323, 325 (1940). Thus, in the run of cases, "[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Id.,* at 325–326. This limitation imposed by Congress must be observed even when the defendant's claim is considered meritorious. See *United States* v. *MacDonald,* 435 U. S. 850, 857–858, n. 6 (1978).

The right asserted by respondents is simply not one that must be upheld prior to trial if it is to be enjoyed at all.[3] As noted in *MacDonald*, *supra*, there is a superficial plausibility to the contention that any claim, particularly a constitutional claim, that would be dispositive of the entire case if decided favorably to a criminal defendant, should be decided as quickly as possible in the course of the litigation. But if such a principle were to be applied, questions as to the constitutionality of the statutes authorizing the prosecution and doubtless numerous other questions would fall under such a definition, and the policy against piecemeal appeals in criminal cases would be swallowed by ever-multiplying exceptions. It is only a narrow group of claims which meet the test of being "effectively unreviewable on appeal from a final judgment," and the claim of prosecutorial vindictiveness is, we hold, not one of them.

The petition for certiorari is granted, and the judgment of the Court of Appeals for the Ninth Circuit is reversed, with instructions to that court to dismiss the appeal.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Today, the Court carries its recent penchant for summary decision to a new extreme. The substantial and controversial question raised here—whether an order denying a motion to dismiss based on prosecutorial vindictiveness is appealable before trial—does not, in my view, lend itself to summary treatment. Nevertheless, the Court has decided this important question of appellate jurisdiction without briefing or argument, even though it was not briefed or argued before the District Court or the Court of Appeals and was not the subject of any lower court opinion. I dissent.

---

[3] By holding that the right asserted by respondents is not one that "will have been lost, probably irreparably," *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949), if appeal is postponed until the rendition of judgment, we imply no view on the merit of respondents' claim or on the more general question whether the Due Process Clause is violated by the addition of charges prior to trial. We merely hold that denial of a motion to dismiss an indictment when the motion is premised on a claim of prosecutorial vindictiveness is not a collateral order that can be appealed prior to judgment under § 1291.

I

The Court, it seems to me, has shown a disturbing tendency of late to dispose of difficult cases by summary *per curiam* reversals. I must assume that this tendency is prompted, at least in part, by the growing pressures of the Court's calendar and an ill-conceived conviction that we must stay abreast of the increasing workload whatever the costs may be. I regret this pattern, for I think it demeans the Court and its work and surely tends to lessen the quality of its legal product.

Summary action is particularly unfortunate in this case, for the Court directs that respondents' appeal be dismissed on an issue that was not raised by the Government until its petition for rehearing in the Court of Appeals. Indeed, for more than a year—until the Court of Appeals ruled on the merits in favor of respondents—the Government affirmatively represented to that court that it "ha[d] jurisdiction to review prior to trial a District Court's denial of a defendant's motion to dismiss for vindictive prosecution." United States' Emergency Motion for Summary Affirmance of District Court, reprinted in App. to Brief in Opposition 5a. As a result, the jurisdictional question was not briefed or argued before the Court of Appeals or the District Court.

Respondents' opposition to the Government's petition for certiorari understandably focuses on arguments for denying certiorari—in particular, the Government's failure to raise the jurisdictional issue in a more timely fashion. Coupled with the Government's litigation strategy, the Court's summary disposition therefore deprives respondents of their "day in court" in a singularly inappropriate manner.

II

Additionally, I do not find today's ruling so clearly compelled as to warrant summary treatment, especially when the Solicitor General, contrary to his frequent practice, has not suggested summary reversal in his petition for certiorari. In my view, the issue is important enough to be briefed and argued fully in at least one court.

Certainly, the Court's disposition is not mandated by our precedents. As the Court explains, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), and *Abney* v. *United States*, 431 U. S. 651 (1977), interpret 28 U. S. C. § 1291 as authorizing interlocutory appeals when a three-part standard has been met. The Court fails, however, to mention the first two requirements, presumably because they are satisfied here: that the denial of a defendant's motion to dismiss an indictment on vindictive prosecution grounds "constitute[s] a complete, formal, and, in the trial court, final rejection of a criminal defendant's [vindictive prosecution] claim," 431 U. S., at 659, and that it resolves an issue that is "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i. e.*, whether or not the accused is guilty of the offense charged," *ibid.* Unlike the speedy trial claim before the Court in *United States* v. *MacDonald*, 435 U. S. 850 (1978), which depended on an assessment of the extent to which delay had prejudiced the defense—an assessment that could only be "speculative" prior to trial, *id.*, at 858—an allegation that the prosecutor impermissibly increased the charges in response to the defendant's exercise of a legal right may be evaluated before trial, for all the facts relevant to such a claim are fully available.

The Court properly suggests that the third requirement set out in *Cohen* and *Abney* is the most difficult to apply in this context. See *ante*, at 267. But, unlike the Court, I find force in respondents' contention that the right they seek to vindicate, in contrast to the right at issue in *MacDonald*, is "a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." 435 U. S., at 861. In *MacDonald*, it was "the delay before trial, not the trial itself, that offend[ed] against the constitutional guarantee of a speedy trial." *Ibid.* When the defendant has been the victim of vindictive prosecution, however, the Court has said that he may "not to be haled into court *at all* upon the [increased] charge." *Blackledge* v. *Perry*, 417 U. S. 21, 30 (1974) (emphasis added). And we have analogized that right to the right protected by the Double Jeopardy Clause, see *id.*, at 31, which must, of course, be vindicated prior to trial if it is to be protected at all.[1]

Moreover, postconviction review may not suffice to remedy the chilling effect the vindictive prosecution doctrine is designed to prevent. The Court repeatedly has declined to hold that the Due Process Clause forbids only prosecutorial action taken with an actual retaliatory motive. Rather, it has emphasized that "'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of [his] right[s] . . . , due process also requires that a defendant be freed of *apprehension* of such a retaliatory motivation . . . .'"

---

[1] See *Abney* v. *United States*, 431 U. S. 651, 659 (1977) (noting that the defendant in *Blackledge* v. *Perry* was "contesting the very authority of the Government to hale him into court to face trial on the charge against him"); *Blackledge* v. *Perry*, 417 U. S., at 30–31 (observing that the defendant's vindictive prosecution claim "went to the very power of the State to bring the defendant into court to answer the charge brought against him"; that, when the prosecutor acts vindictively in enhancing charges, the State is "simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge . . ."; that "[t]he very initiation of the proceedings against [a defendant subjected to vindictive prosecution] operated to deny him due process of law"; and that "North Carolina simply could not permissibly require Perry to answer to the felony charge").

Id., at 28 (emphasis added), quoting *North Carolina* v. *Pearce*, 395 U. S. 711, 725 (1969); see also *United States* v. *Goodwin*, 457 U. S. 368, 375–376 (1982). Even if a defendant is convinced that his vindictive prosecution claim ultimately will prevail on postconviction review, the increased burdens attending a trial on enhanced charges may deter him from exercising his legal rights. This may well not be a case, then, where "reversal of the conviction and . . . a new trial free of prejudicial error" are "adequate means of vindicating the constitutional rights of the accused." *Ante*, at 268.

In addition to extending our precedents, the Court goes well beyond the rulings of the two Courts of Appeals it characterizes as "directly conflict[ing]" with the decision below. *Ante*, at 264, n. 1. In *United States* v. *Brizendine*, 212 U. S. App. D. C. 169, 180, 659 F. 2d 215, 226 (1981), the United States Court of Appeals for the District of Columbia Circuit refused to permit interlocutory appeals involving "claims of due process violations arising from the plea bargaining process." That court, however, expressly refused to consider the appealability of the denial of a motion to dismiss "in the *Blackledge* situation . . . ," where the defendant's claim "turned on a purely legal issue . . ." and challenged increased charges filed in response to his exercise of a legal right. *Id.*, at 175, 659 F. 2d, at 221. Similarly, in *United States* v. *Gregory*, 656 F. 2d 1132, 1136 (1981), the United States Court of Appeals for the Fifth Circuit did not foreclose the possibility that some claims of prosecutorial vindictiveness could be the subject of interlocutory appeal.[2]

---

[2] Other Courts of Appeals have not restricted interlocutory appeals to the three instances in which this Court has applied the collateral-order doctrine in criminal cases, see *ante*, at 265–266. See *United States* v. *Venable*, 585 F. 2d 71, 74–75 (CA3 1978) (denial of motion to bar retrial on collateral estoppel grounds is immediately appealable); *United States* v. *Alessi*, 536 F. 2d 978, 980–981 (CA2 1976) (denial of motion to dismiss indictment that allegedly violated prior plea bargain may be the subject of an interlocutory appeal).

I cannot conclude that the Court's ruling is compelled by our prior cases or is even consistent with the clear weight of authority in the Courts of Appeals. I would grant the petition for certiorari and set the case for oral argument.

SOUTH DAKOTA *v.* NEBRASKA ET AL.

ON BILL OF COMPLAINT

No. 72, Orig. Findings and decree entered June 28, 1982

The Report of the Special Master is received and ordered filed.

This matter comes before this Court on Stipulation by each of the parties hereto: the State of South Dakota, by and through its Attorney General, Mark Meierhenry; the State of Nebraska, by and through its Attorney General, Paul L. Douglas; the Intervenors, by and through themselves and their attorney, Everett A. Bogue.

FINDINGS AND DECREE

IT IS THE FINDING OF THIS COURT THAT:

1. The parties have concluded that it is in the best interest of each of them to avoid litigation and multiple exercises of sovereignty and jurisdiction, encourage the optimum beneficial use of the river, its facilities and its waters, and remove all causes of controversy between said parties with respect to the location of the boundary between the States and, therefore, to settle and to terminate this dispute by agreement and compromise and submission of the boundary between the State of South Dakota and the State of Nebraska with respect to Rush Island in the future to a Joint State Boundary Commission.

2. In the furtherance of the best interests of each of the parties, it is agreed that that land known as "Elk/Rush Island," subject of this lawsuit, is now, and has been, within the boundary of the State of Nebraska and subject to its jurisdiction.

3. The State of South Dakota has agreed to cede to the Intervenors any right or title it may have in the subject property known as "Elk/Rush Island," more fully described in Appendix A attached to the Stipulation; and the State of South

Dakota specifically recognizes the Judgment of the District Court of Cedar County, Nebraska, dated November 7, 1958, which quieted title to the above identified land in Clyde Gill and others, predecessors of the Intervenors, which action can be found in the records of Cedar County District Court of Nebraska, Case No. 5628, Docket 24, Page 13.

4. The State of South Dakota has further agreed to dismiss an action to quiet title filed in the Circuit Court of Yankton, South Dakota, regarding this subject property.

5. The States of Nebraska and South Dakota have agreed to submit the determination of future boundary changes with regard to "Elk/Rush Island" but not to the title to the premises therein, to a Joint State Boundary Commission appointed by the elected officials of these respective States for the Commission's determination from the date of that determination forth.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that pursuant to the above Stipulations and Findings:

1. That the land known as "Elk/Rush Island," the subject of this litigation, be and the same is within the boundary of the State of Nebraska, and subject to its jurisdiction;

2. That the State of South Dakota hereby cedes to the Intervenors any right or title it may have to the subject property known as "Elk/Rush Island" as more fully described in Appendix A attached hereto;

3. That the States of Nebraska and South Dakota will submit the determination of the future boundary changes, if any, with regard to "Elk/Rush Island," but not to the title of the premises thereto, to a Joint State Boundary Commission appointed by the elected officials of these respective States for the Commission's determination from the date of that determination forth;

4. That the State of South Dakota and the State of Nebraska will proceed to effectuate any and all other requirements agreed to in the Stipulation to the extent that conditions and circumstances permit; and

5. Each party shall bear its own costs.

APPENDIX A

Rush Island in the Missouri River, said island being a part of Sections 5, 6 and 7, Township 33, Range 1, East, Cedar County, Nebraska, according to the original Government Survey and which is more fully and particularly described in the Surveyor's record No. 5, Page 70 as follows: Commencing at the Section corner of Sections 7 and 8, in Township 33, Range 1, East, Cedar County, Nebraska, as is located by the survey recorded in Surveyor's Record, Volume 4, page 29 of the records of Cedar County, Nebraska, thence running due north from this corner 5060 feet to the point of beginning, thence running 710 feet north 81 degrees east, thence 805 feet north 68 degrees east, thence 942 feet north 59 degrees east, thence 326 feet north 88 degrees east, thence 874 feet north 84 degrees east, thence 362 feet south 54 degrees east, thence 305 feet north 58 degrees east, thence 1140 feet north 65 degrees east, thence 1315 feet north 5 degrees east, thence 805 feet north 60 degrees west, thence 1800 feet north 69 degrees west, thence 1225 feet north 72 degrees west, thence 2080 feet north 79 degrees west, thence 1390 feet north 57 degrees west, thence 1160 feet north 86 degrees west, thence 582 feet south 84 degrees west, thence 1090 feet south 55 degrees west, thence 1980 feet south 89 degrees west, thence 688 feet south 47 degrees west, thence 1400 feet south 20 degrees west, thence 1415 feet south 55 degrees west, thence 865 feet south 78 degrees east, thence 588 feet south 87 degrees east, thence 2220 feet south 72 degrees east, thence 2530 feet south 78 degrees east, thence 1890 feet south 62 degrees east, thence 425 feet south 71 degrees east to the point of beginning, containing 994 acres more or less, all in Township 33, Range 1 East in Cedar County, Nebraska, and that intervenors are the record owners thereof.

WILLIAMS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-2116. Argued April 20, 1982—Decided June 29, 1982

Title 18 U. S. C. § 1014 makes it a crime to "knowingly mak[e] any false statement or report," or "willfully overvalu[e] any land, property or security," for the purpose of influencing the action of described financial institutions (including federally insured banks) "upon any application, advance, . . . commitment, or loan." Petitioner engaged in a series of transactions seemingly amounting to a case of "check kiting" between his accounts in federally insured banks, first drawing a check far in excess of his account balance in one bank and depositing it in his account in the other, and then reversing the process between his accounts. Petitioner was convicted in Federal District Court of violating § 1014, and the Court of Appeals affirmed.

Held: Petitioner's conduct in depositing "bad checks" in federally insured banks is not proscribed by § 1014. Pp. 284-290.

(a) Petitioner's actions did not involve the making of a "false statement." Technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false." Similarly, petitioner's conduct cannot be regarded as "overvalu[ing]" property or a security. In a literal sense, the face amounts of the checks were their "values." To interpret § 1014 as meaning that a drawer of a check has made a "false" statement whenever he has insufficient funds in his account at the moment the check is presented would "sligh[t] the wording of the statute" *United States* v. *Enmons*, 410 U. S. 396, 399, and would render a wide range of unremarkable conduct violative of federal law. When § 1014 was enacted, federal action was not necessary to interdict the deposit of bad checks, for fraudulent checking activities already were addressed in comprehensive fashion by state law. Pp. 284-287.

(b) The legislative history does not support the proposition that § 1014 was designed to have general application to the passing of worthless checks, and does not demand that the statute be read as applicable to anything other than representations made in connection with conventional loan or related transactions. A narrow interpretation of § 1014 is consistent with the usual approach of lenity in the construction of criminal statutes. Pp. 288-290.

639 F. 2d 1311, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 291. MARSHALL, J., filed a dissenting opinion, in which BURGER, C. J., and BRENNAN and WHITE, JJ., joined, *post*, p. 292.

Nickolas P. Chilivis argued the cause and filed briefs for petitioner.

Richard G. Wilkins argued the cause *pro hac vice* for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Shapiro, William C. Bryson, Douglas S. Wood,* and *Janis H. Kockritz.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we must decide whether the deposit of a "bad check" in a federally insured bank is proscribed by 18 U. S. C. §1014.

I

In 1975, petitioner William Archie Williams purchased a controlling interest in the Pelican State Bank in Pelican, La., and appointed himself president. The bank's deposits were insured by the Federal Deposit Insurance Corporation.

Among the services the bank provided its customers at the time of petitioner's purchase was access to a "dummy account," used to cover checks drawn by depositors who had insufficient funds in their individual accounts. Any such check was processed through the dummy account and paid from the bank's general assets. The check was then held until the customer covered it by a deposit to his own account, at which time the held check was posted to the customer's account and the dummy account was credited accordingly. As president of the bank, petitioner enjoyed virtually unlimited use of the dummy account, and by May 2, 1978, his personal overdrafts amounted to $58,055.44, approximately half the total then covered by the account.

On May 8, 1978, federal and state examiners arrived at the Pelican Bank to conduct an audit. That same day, petitioner embarked on a series of transactions that seemingly amounted to a case of "check kiting."[1] He began by opening a checking account with a deposit of $4,649.97 at the federally insured Winn State Bank and Trust Company in Winnfield, La. The next day, petitioner drew a check on his new Winn account for $58,500—a sum far in excess of the amount actually on deposit at the Winn Bank—and deposited it in his Pelican account. Pelican credited his account with the face value of the check, at the same time deducting from petitioner's account the $58,055.44 total of his checks that previously had been cleared through the dummy account. At the close of business on May 9, then, petitioner had a balance of $452.89 at the Pelican Bank.

On May 10, petitioner wrote a $60,000 check on his Pelican account—again, a sum far in excess of the account balance—and deposited it in his Winn account. The Winn Bank immediately credited the $60,000 to petitioner's account there, and Pelican cleared the check through its dummy account when it was presented for payment on May 11. The Winn Bank routinely paid petitioner's May 9 check for $58,500 when it cleared on May 12.

---

[1] As the Government explains, a check-kiting scheme typically works as follows: "The check kiter opens an account at Bank A with a nominal deposit. He then writes a check on that account for a large sum, such as $50,000. The check kiter then opens an account at Bank B and deposits the $50,000 check from Bank A in that account. At the time of deposit, the check is not supported by sufficient funds in the account at Bank A. However, Bank B, unaware of this fact, gives the check kiter immediate credit on his account at Bank B. During the several-day period that the check on Bank A is being processed for collection from that bank, the check kiter writes a $50,000 check on his account at Bank B and deposits it into his account at Bank A. At the time of the deposit of that check, Bank A gives the check kiter immediate credit on his account there, and on the basis of that grant of credit pays the original $50,000 check when it is presented for collection.

"By repeating this scheme, or some variation of it, the check kiter can use the $50,000 credit originally given by Bank B as an interest-free loan for an extended period of time. In effect, the check kiter can take advantage of the several-day period required for the transmittal, processing, and payment of checks from accounts in different banks . . . ." Brief for United States 12–13.

Petitioner next attempted to balance his Pelican account by depositing a $65,000 check drawn on his account at yet another institution, the Sabine State Bank in Many, La. Unfortunately, the balance in petitioner's Sabine account at the time was only $1,204.81. The Sabine Bank therefore refused payment when Pelican presented the check on May 17. On May 23, petitioner settled his Pelican account by depositing at the Pelican Bank a $65,000 money order obtained with the proceeds from a real estate mortgage loan.

The bank examiners, meanwhile, had been following petitioner's activities with considerable interest. Their scrutiny ultimately led to petitioner's indictment, in the United States District Court for the Western District of Louisiana, on two counts of violating 18 U. S. C. § 1014.[2] That provision makes it a crime to

> "knowingly mak[e] any false statement or report, or willfully overvalu[e] any land, property or security, for the purpose of influencing in any way the action of [certain enumerated financial institutions, among them banks whose deposits are insured by the Federal Deposit Insurance Corporation], upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan . . . ."

The first of the counts under § 1014 was directed at the May 9, 1978, check drawn on the Winn Bank, and charged that petitioner "did knowingly and willfully overvalue . . . a security, that is a check . . . for the purpose of influencing the Pelican State Bank, . . . a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, upon an advance of money and extension of credit." The other

---

[2] Petitioner also was charged with—and thereafter convicted of—one count of misapplying bank funds, in violation of 18 U. S. C. § 656. The validity of that conviction, which was affirmed on appeal, is not before us.

§ 1014 count used virtually identical language to indict petitioner for depositing in his Winn account the May 10 check drawn on the Pelican Bank. App. 3–4.[3]

At petitioner's trial the court charged the jury that "[a] check is a security for purposes of Section 1014." The court then explained that "[t]he Government charges that Mr. Williams was involved in check-kiting—a scheme whereby false credit is obtained by the exchange and passing of worthless checks between two or more banks." *Id.*, at 36. To convict petitioner, the court continued, the jury had to find as to each count that "the defendant . . . did knowingly and willfully make a false statement of a material fact," that the statement "influence[d] the decision of the [bank] officers or employees," and that "the defendant made the false statement with fraudulent intent to influence the [bank] to extend credit to the defendant." *Id.*, at 37–38. "The crucial question in check-kiting," the court concluded, "is whether the defendant intended to write checks which he could not reasonably expect to cover and thereby defraud the bank, or whether he was genuinely involved in the process of depositing funds and then making legitimate withdrawals against them." *Id.*, at 38. The jury convicted petitioner on both counts, and he was sentenced to six months' incarceration on the second § 1014 count. For the first § 1014 count he was placed on five years' probation, to begin upon his release from confinement. App. 39.[4]

---

[3] Neither of the § 1014 counts of the indictment expressly charged petitioner with making a "false statement." The first count, however, did allege that he "presented said check for deposit at Pelican State Bank . . . and represented and caused to be represented to said bank that said check was of a value equal to the face amount of the check, when in truth and fact, as the [petitioner] then well knew, there were no sufficient funds in the account of W. A. Williams at the Winn State Bank and Trust Company, to cover said check." App. 3. Similar language was employed in the second § 1014 count. *Id.*, at 4.

[4] The sentence of probation also applied to petitioner's conviction for misapplication of bank funds. See n. 2, *supra*.

Among other things, petitioner argued on appeal that the indictment did not state a violation of § 1014. The Court of Appeals rejected this contention, however, concluding that petitioner's actions "constitute classic incidents of check kiting." 639 F. 2d 1311, 1319 (CA5 1981). In line with its earlier decision in *United States* v. *Payne*, 602 F. 2d 1215 (CA5 1979), cert. denied, 445 U. S. 903 (1980), the court found such action proscribed by the statute.

We granted certiorari, limited to Questions 3 and 4 presented by the petition, in order to resolve a conflict concerning the reach of § 1014.[5] 454 U. S. 1030 and 1096 (1981).

II

To obtain a conviction under § 1014, the Government must establish two propositions: it must demonstrate (1) that the defendant made a "false statement or report," or "willfully overvalue[d] any land, property or security," and (2) that he did so "for the purpose of influencing in any way the action of [a described financial institution] upon any application, advance, . . . commitment, or loan." We conclude that petitioner's convictions under § 1014 cannot stand, because the Government has failed to meet the first of these burdens.

A

Although petitioner deposited several checks that were not supported by sufficient funds, that course of conduct did not involve the making of a "false statement," for a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false." Petitioner's bank checks served only to direct the drawee banks to pay the face amounts to the bearer, while committing petitioner to make good the obligations if the banks dishonored the drafts. Each check did not, in terms, make any representation as to the state of petitioner's bank balance. As defined in the Uniform Commercial Code, 2 U. L. A. 17 (1977), a check is simply "a draft drawn on a bank and payable on demand," § 3-104(2)(b), which "contain[s] an unconditional promise or order to pay a sum certain in money," § 3-104(1)(b). As such, "[t]he drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder." § 3-413(2), 2 U. L. A. 424 (1977). The Code also makes clear, however, that "[a] check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." § 3-409(1), 2 U. L. A. 408 (1977). Louisiana, the site of petitioner's unfortunate banking career, embraces verbatim each of these definitions. See La. Rev. Stat. Ann. §§ 10:3-104, 10:3-409, 10:3-413 (West Supp. 1982).[6]

---

[5] See *United States* v. *Sher*, 657 F. 2d 28 (CA3 1981), cert. pending, No. 81–1047 (holding that § 1014 does not proscribe check kiting). Cf. *United States* v. *Krown*, 675 F. 2d 46, 50 (CA2 1982) (noting the conflict).

For similar reasons, we conclude that petitioner's actions cannot be regarded as "overvalu[ing]" property or a security. Even assuming that petitioner's checks were property or a security as defined by § 1014, the value legally placed upon them was the value of petitioner's obligation; as defined by Louisiana law, that is the only meaning actually attributable to a bank check. See La. Rev. Stat. Ann. §§ 10:3-409(1), 10:3-413(2) (West Supp. 1982). In a literal sense, then, the face amounts of the checks were their "values."

The foregoing description of bank checks is concededly a technical one, and the Government therefore argues with some force that a drawer is generally understood to represent that he "currently has funds on deposit sufficient to cover the face value of the check." Brief for United States 19. See *United States* v. *Payne*, 602 F. 2d, at 1218. If the drawer has insufficient funds in his account at the moment the check is presented, the Government continues, he effectively has made a "false statement" to the recipient. While this broader reading of § 1014 is plausible, we are not persuaded that it is the preferable or intended one. It "slights the wording of the statute," *United States* v. *Enmons*, 410 U. S. 396, 399 (1973), for, as we have noted, a check is literally not a "statement" at all. In any event, whatever the general understanding of a check's function, "false statement" is not a term that, in common usage, is often applied to characterize "bad checks." And, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable "understandings."[7]

---

[6] Unlike many state statutes that do proscribe conduct such as that engaged in by petitioner, the federal scheme obviously does not in terms reach the deposit of checks that are supported by insufficient funds. See Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals, 38 Mo. L. Rev. 432 (1973).

Equally as important, the Government's interpretation of § 1014 would make a surprisingly broad range of unremarkable conduct a violation of federal law. While the Court of Appeals addressed itself only to check kiting, its ruling has wider implications: it means that any check, knowingly supported by insufficient funds, deposited in a federally insured bank could give rise to criminal liability, whether or not the drawer had an intent to defraud. Under the Court of Appeals' approach, the violation of § 1014 is not the *scheme* to pass a number of bad checks; it is the presentation of one false statement—that is, one check that at the moment of deposit is not supported by sufficient funds—to a federally insured bank. The United States acknowledged as much at oral argument. Tr. of Oral Arg. 40. Indeed, each individual count of the indictment in this case stated only that petitioner knowingly had deposited a single check that was supported by insufficient funds, not that he had engaged in an extended scheme to obtain credit fraudulently.[8]

---

[7] That is particularly true where, as here, it is not immediately clear what "common understanding" would recognize as the implied representation of the act of depositing one's own check. The United States suggests that one who deposits a check represents that he "currently has funds on deposit sufficient to cover the face value." Brief for United States 19. But it would be equally plausible to suggest that many people understand a check to represent that the drawer will have sufficient funds deposited in his account by the time the check clears, or that the drawer will make good the face value of the draft if it is dishonored by the bank. We therefore find "common understanding" a particularly fragile foundation upon which to base an interpretation of § 1014.

Yet, if Congress really set out to enact a national bad check law in § 1014, it did so with a peculiar choice of language and in an unusually backhanded manner. Federal action was not necessary to interdict the deposit of bad checks, for, as Congress surely knew, fraudulent checking activities already were addressed in comprehensive fashion by state law. See Comment, Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals, 38 Mo. L. Rev. 432 (1973). Absent support in the legislative history for the proposition that § 1014 was "designed to have general application to the passing of worthless checks," *United States* v. *Krown*, 675 F. 2d 46, 50 (CA2 1982), we are not prepared to hold petitioner's conduct proscribed by that particular statute.[9]

---

[8] JUSTICE MARSHALL's dissent does not fully respond to this point. That opinion, like the Government's brief, emphasizes that petitioner's "conduct was wrongful," *post*, at 293, and deals only with § 1014's application to check kiting. See also *post*, at 294, 295, 299, 300, and 301. Indeed, the dissent seems to suggest that that statute would not reach the conduct of a defendant who "wrote a check on an account containing insufficient funds with the good-faith intention to deposit in that account an amount that would cover the check before it cleared in the normal course of business." *Post*, at 292. Accepting JUSTICE MARSHALL's theory, however, would bring such conduct within the literal language of the statute, for a "false statement" would have been submitted with the hope of inducing a bank to "advance" funds. While the dissent attempts to avoid this by suggesting that there would be no violation of § 1014 absent an intent "to defraud," *post*, at 301, n. 4, the language of the statute imposes no such intent requirement. And as we emphasize above, we believe that the wording of § 1014 would be a peculiar choice of terms if Congress wished to proscribe such conduct.

[9] JUSTICE MARSHALL's dissent rests entirely on the proposition that petitioner's conduct falls within the "plain language" of § 1014. *Post*, at 293. See also *post*, at 301, 302, and 305–306. In our view, that literally is not

B

In the 1948 codification of Title 18 of the United States Code, 62 Stat. 683, § 1014 reduced 13 existing statutes, which criminalized fraudulent practices directed at a variety of financial and credit institutions, to a single section. See 18 U. S. C. § 1014, Historical and Revision Notes. Of the originally enumerated institutions,[10] only two—the Reconstruction Finance Corporation, see 15 U. S. C. § 616(a) (1946 ed.), and the Federal Reserve Banks, see 12 U. S. C. § 596 (1946 ed.)—performed duties other than the making of farm and home loans, and neither of those two organizations accepted checks for deposit from private customers. See *United States* v. *Sabatino*, 485 F. 2d 540, 548 (CA2 1973), cert. denied, 415 U. S. 948 (1974); *United States* v. *Edwards*, 455 F. Supp. 1354, 1357 (MD Pa. 1978). It is evident, then, that bad checks were not among the "false statements" or "overvalued property" originally addressed by the statute. While Congress has added and subtracted certain institutions to and from the list covered by § 1014 over the intervening years, no changes have been made in the type of transactions proscribed by the provision.

The legislative history does not demand a broader reading of the statute. The amendments adding institutions to § 1014's list attracted little attention in Congress and were dealt with summarily; at no point was it suggested that the statute should be applicable to anything other than represen-

---

true. And even if one looks to the "common understanding" so emphasized by JUSTICE MARSHALL, *post*, at 296–298, the statute is at best ambiguous, for we doubt that the public typically describes bad checks as "false statements."

[10] These included the Farmers' Home Corporation, the Federal Crop Insurance Corporation, Federal Reserve Banks, the Farm Credit Administration, Federal Credit Banks, the Federal Farm Mortgage Corporation, the National Agricultural Credit Corporation, Federal Home Loan Banks, the Home Owners' Loan Corporation, the Reconstruction Finance Corporation, and related institutions. See 7 U. S. C. §§ 1026(a), 1514(a) (1946 ed.); 12 U. S. C. §§ 596, 981, 1122, 1123, 1138d(a), 1248, 1312, 1313, 1441(a), 1467(a) (1946 ed.); 15 U. S. C. § 616(a) (1946 ed.).

tations made in connection with conventional loan or related transactions. In 1964, for example, when Congress, by Pub. L. 88–353, § 5, 78 Stat. 269, added Federal Credit Unions to the statutory list, § 1014 was described as barring "false statements or willful overvaluations in connection with applications, loans, and the like." S. Rep. No. 1078, 88th Cong., 2d Sess., 1 (1964). Thus, the Senate Committee on Banking and Currency declared that § 1014 "is designed primarily to apply to borrowers from Federal agencies or federally chartered organizations."[11] *Id.*, at 4. Similarly, the first of two 1970 amendments, which added state-chartered credit unions to the statutory list, Pub. L. 91–468, § 7, 84 Stat. 1017, was characterized simply as "relating to false statements in loan and credit applications." H. R. Rep. No. 91–1457, p. 21 (1970).

A second 1970 amendment, Pub. L. 91–609, § 915, 84 Stat. 1815, added banks insured by the Federal Deposit Insurance Corporation, Federal Home Loan Banks, and institutions insured by the Federal Savings and Loan Insurance Corporation, for the first time listing institutions that engaged in commercial checking.[12] But there was no contemporaneous congressional recognition of the substantial expansion of federal criminal jurisdiction that would attend the proscription of bad checks. To the contrary, the Reports accompanying the amendment stated simply that the addition "would describe more explicitly the institutions which are covered by 18 U. S. C. § 1014, which provides penalties for making false statements or reports in connection with loans or other similar transactions." H. R. Rep. No. 91-1556, p. 35 (1970). See H. R. Conf. Rep. No. 91-1784, p. 66 (1970). Congressional debate was directed only at the addition of federally insured savings and loan institutions, which was said to "mak[e] it a Federal crime to submit false data to an insured savings and loan on the true value of a property on which a mortgage is to be granted." 116 Cong. Rec. 42633 (1970) (remarks of Rep. Sullivan).

---

[11] The Committee added ambiguously that the statute "is not, however, limited by its terms to borrowers and would seem also to apply to others, including for example, officers and employees of the agencies and institutions named." S. Rep. No. 1078, 88th Cong., 2d Sess., 4 (1964).

[12] Also added to the list in 1970 were the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation themselves, as well as the Administrator of the National Credit Union Administration. Pub. L. 91–609, § 915, 84 Stat. 1815.

Given this background—a statute that is not unambiguous in its terms and that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law—we believe that a narrow interpretation of § 1014 would be consistent with our usual approach to the construction of criminal statutes. The Court has emphasized that "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States* v. *Bass*, 404 U. S. 336, 347 (1971), quoting *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221-222 (1952).[13] To be sure, the rule of lenity does not give courts license to disregard otherwise applicable enactments. But in a case such as this one, where both readings of § 1014 are plausible, "it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the" deposit of bad checks. *United States* v. *Enmons*, 410 U. S., at 411.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

---

[13] We therefore find it somewhat surprising that JUSTICE MARSHALL's dissenting opinion takes us to task for noting the applicability of the rule of lenity to the interpretation of what we believe to be an ambiguous statute.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

The majority reverses petitioner's conviction under 18 U. S. C. § 1014 on the grounds that the Government has not shown that he made a "false statement or report" or "willfully overvalue[d] any land, property or security." *Ante*, at 284. According to the majority, a check is not a statement; it is merely an order to the drawee bank to pay the face amount to the payee and a promise to pay the amount of the check upon notice of dishonor. *Ante*, at 284–285. Like JUSTICE MARSHALL, I do not disagree with the majority that under the Uniform Commercial Code a check constitutes an order to the drawee bank and a promise to pay upon notice of dishonor. However, the fact that the Uniform Commercial Code describes a check in this manner does not mean that a check does not carry with it other representations, for the Code does not purport to contain an all-inclusive definition of a check.

It defies common sense and everyday practice to maintain, as the majority does, that a check carries with it no representation as to the drawer's account balance. No bank would give a customer immediate credit for a check drawn on another bank or reduce a check to cash if it did not believe that the check would be paid in the normal course of collection. It could be argued that petitioner did not make a false statement with respect to the May 10 check drawn on the Pelican Bank because he knew the bank would pay the check through its dummy account. However, petitioner does not contend that he had any such arrangement with the Winn Bank, and thus the May 9 check for $58,500 drawn on the Winn Bank, when his balance was $4,649.97, can fairly be said to constitute a false statement. In any event, a properly instructed jury surely found that Williams had made false representations with respect to each of the checks that were the subject of this indictment.

If the majority really means what it says in Part II–A of its opinion—that the Government failed to show that petitioner made a false statement or overvalued property or security—it is unnecessary to explore the legislative history of § 1014 or to apply the rule of lenity. On the other hand, if the majority reverses the Court of Appeals because it cannot conceive that Congress intended § 1014 to reach the conduct at issue because the area has long been regulated by state law, it is not necessary to employ the fiction that a check does not entail a representation that it will be paid in the normal course of business by the drawee bank. Because the majority opinion appears to me to rest on that fiction, I respectfully dissent. I also join JUSTICE MARSHALL's dissenting opinion.

JUSTICE MARSHALL, with whom THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE WHITE join, dissenting.

The majority, after developing an overly technical "definition" of the meaning of a check—a definition which will come as quite a surprise to banks and businesses that accept checks in exchange for goods, services, or cash on the representation that the drawer has sufficient funds to cover the check—concludes that the question whether petitioner Williams' check-kiting scheme is covered by 18 U. S. C. § 1014 is ambiguous. The majority then applies its version of the rule of lenity, and decides that Williams cannot be convicted for violating this statute. Because I believe that the majority misapplies the rule of lenity, and because Williams' conduct is clearly prohibited by the statute, I respectfully dissent.

I

Before addressing the application of § 1014 to Williams' conduct, I think that it is helpful to set forth clearly what is *not* involved here. This is not a case in which a defendant, through careless bookkeeping, wrote checks on accounts with insufficient funds. Nor is this a case in which a defendant wrote a check on an account containing insufficient funds with the good-faith intention to deposit in that account an amount that would cover the check before it cleared in the normal course of business. Rather, this case clearly involves fraudulent conduct. Petitioner Williams engaged in an intentional check-kiting scheme. He misled the first bank into honoring his worthless, or virtually worthless, check and extending him immediate credit. This extension of credit enabled him to "play the float" and cover that check by misleading another bank into extending him credit on an equally worthless check. In effect, Williams was able to obtain interest-free extensions of credit. Williams, who was a bank president, does not, nor can he, make any credible argument that he was unaware that his conduct was wrongful. With this in mind, I turn to the question whether Williams' conduct constitutes a violation of 18 U. S. C. § 1014.

Section 1014 is a comprehensive statute designed to protect the assets of federally insured lending institutions. The Government establishes a violation of this statute by proving that the defendant "knowingly [made] *any* false statement or . . . willfully overvalue[d] *any* . . . property or security, for the purpose of influencing *in any way* the action of [any federally insured bank] upon *any* . . . *advance*, . . . commitment, or loan." 18 U. S. C. § 1014 (emphasis added). Just last Term, we reiterated that "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States* v. *Turkette*, 452 U. S. 576, 580 (1981) (quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980)). In my view, the plain language of § 1014 covers the check-kiting scheme practiced by Williams, and nothing in the legislative history of the statute indicates that Congress intended to exclude this type of scheme from the coverage of the statute.

A

The language of § 1014 is sweeping. It embraces numerous entities in which the Federal Government has a financial interest. It proscribes, in the disjunctive, a wide variety of deceptive schemes that might impair the financial stability of these institutions. Cf. *United States* v. *Naftalin*, 441 U. S. 768, 774 (1979) (disjunctive prohibitions intended to "cover additional kinds of illegalities—not to narrow the reach of the prior sections"). The statute refers broadly to "any false statement or report," and to overvaluations of "any" property or security. The list of transactions to which the statute applies is equally expansive—it covers "any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor." 18 U. S. C. § 1014.

The broad statutory language clearly evinces its legislative purpose—Congress hoped to protect federally insured institutions from losses stemming from false statements or misrepresentations that mislead the institutions into making financial commitments, advances, or loans. The statute was intended to be broad enough "to maintain the vitality of the FDIC insurance program . . . and 'to cover all undertakings which might subject the FDIC insured bank to risk of loss.'" *United States* v. *Pinto*, 646 F. 2d 833, 838 (CA3) (quoting *United States* v. *Stoddart*, 574 F. 2d 1050, 1053 (CA10 1978)), cert. denied, 454 U. S. 816 (1981). This broad language does not lend itself to the restrictive interpretation endorsed by the Court today. Cf. *United States* v. *Culbert*, 435 U. S. 371 (1978).

Nothing on the face of § 1014 "suggests a congressional intent to limit its coverage" to a particular kind of transaction. *United States* v. *Culbert*, *supra*, at 373. Check kiting, which threatens the assets of federally insured banks in precisely the same way as a misrepresentation in a loan application, should not be excluded from the reach of the statute simply because the terms of the statute and its legislative history do not specifically identify check kiting by name or precise description. This method of statutory construction was rejected recently in *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 592 (1980):

> "[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."

Unfortunately, in my view, the Court's approach to interpreting § 1014 comes dangerously close to the method we rejected in *Harrison*. Unless one accepts the Court's overly restrictive and technical "definition" of a check, check-kiting schemes clearly fall within the broad language of that statute.

B

As the majority recognizes, a violation of § 1014 is established when the Government proves two elements: that the defendant either made a "false statement or report," or "willfully overvalue[d] any . . . property or security;" and that the defendant did so "for the purpose of influencing in any way the action of [a federally insured institution] upon any application, advance, . . . commitment, or loan." After recognizing this, however, the majority's analysis jumps the track. The majority concludes that when a drawer presents a kited check to a bank with the knowledge that he does not have sufficient funds, and with the intent not to cover that check with anything other than another virtually worthless kited check, he has not made "any false statement or report," or "willfully overvalue[d] any . . . property or security" within the meaning of the statute. In my view, neither of these conclusions withstands analysis.

(1)

The basis for the Court's conclusion that Williams did not make a "false statement or report" is concededly technical and "simple": "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'" *Ante*, at 284. This argument proves too much: it would apply equally to material omissions or failures to disclose in connection with loan applications. However, the Courts of Appeals have held that the failure to disclose material information needed to avoid deception in connection with loan transactions covered by § 1014 constitutes a "false statement or report," and thus violates the statute. See, *e. g.*, *United States* v. *Greene*, 578 F. 2d 648, 657 (CA5 1978), cert. denied, 439 U. S. 1133 (1979). I assume that the majority would not disagree with this analysis, which is based on established contract principles. I am at a loss as to why the majority does not apply the same analysis to the transactions at issue in this case.

The majority's description of a check as an "'unconditional promise or order to pay a sum certain in money,'" *ante*, at 285 (quoting the Uniform Commercial Code § 3-104(1)(b), 2 U. L. A. 17 (1977)), is unexceptionable as a conclusory description of "black-letter" law. However, this oversimplified description fails to look behind the bare technical definition of a check. Moreover, this description is not at all inconsistent with the necessary implications that a check carries. "In giving a check, the drawer impliedly represents that he has on deposit with the drawee banks funds equivalent to the face amount of the check." F. Whitney, The Law of Modern Commercial Practices § 341 (2d ed. 1965).[1] Despite the majority's equivocation on this point, those who write or accept checks in exchange for goods, services, or cash undoubtedly understand that this implicit representation has been made.[2]

---

[1] The Court's facile conclusion that Williams made no false statement or misrepresentation when he presented his check to a bank for immediate credit, knowing that the check was not supported by sufficient funds and that he was not going to cover the check before it cleared with anything other than another kited check, is contrary to the theory underlying most prosecutions under state bad check laws. These laws are not based upon the defendant's breach of a contractual promise that he will pay a sum certain upon demand, but upon the fact that in knowingly presenting a bad check the defendant has committed fraud and misrepresentation and can be punished for committing a crime. Brief for United States 20; Brief for Pe-

---

titioner 28–29, and n. 17. See also F. Whitney, The Law of Modern Commercial Practices § 341 (2d ed. 1965). The Court attempts to avoid the obvious problem this fact presents to its method of statutory interpretation by stating that the federal statute does not apply "in terms" to check kiting, while some state laws do. See *ante*, at 285, n. 6. This reasoning is circular. The *reason* why § 1014 does not "in terms" reach a check-kiting scheme, while certain state laws do, is because the Court *ipse dixit* totally discredits the theory upon which the state laws are premised and refuses to read the terms of the statute in the only manner that is consistent with this theory.

[2] The manner in which the Court manufactures "confusion" over the common understanding of a check is difficult to comprehend. See *ante*, at 286, n. 7. Most of it is totally irrelevant because each of the majority's "common understandings" of the meaning of a check are entirely consistent with prosecuting a check-kiting scheme under § 1014. The majority suggests that the "common understanding" of a check is only that sufficient funds will be present by the time the check clears *or* that the drawer will make good the payment of the face amount of the check if the bank refuses payment. Even if the majority is correct, prosecuting a check-kiting scheme under § 1014 would be justified because the jury found that Williams had intentionally acted inconsistently with each of these understandings.

The jury was specifically instructed that it could not convict unless it found that Williams "made the false statement with fraudulent intent to influence the [bank] to extend [him] credit." App. 37. The judge added that a statement is "false" if it "relates to a material fact and is untrue and is then known to be untrue by the person making it." *Id.*, at 38. The judge further instructed the jury that "[t]he crucial question in check-kiting is whether the defendant intended to write checks which he could not reasonably expect to cover and thereby defraud the bank, or whether he was genuinely involved in the process of depositing funds and then making legitimate withdrawals against them. Hence, proof that the checks were eventually paid might well be pertinent to defendant's initial intent, that is, whether he intended to deceive the bank." *Ibid.* Therefore, the jury was clearly instructed to acquit Williams if he had shared with the Court even its most lenient and unrealistic interpretation of the implied representation made when one presents a check. The jury had to find that Williams had given the bank the kited check with the express intent not to actually cover the check, but only to receive this extension of credit for as long as the check-kiting scheme continued.

A check is accepted with the expectation that it will be paid in the normal course of collection. A banker who knew that the drawer did not have funds on deposit would not credit the check to the drawer's account or reduce it to cash. Regardless of any contractual breach also involved in check kiting, a person who writes a series of checks knowing that there are no funds to cover them has made intentional false representations within the reach of § 1014.

Any other view, including that endorsed by the Court today, would interfere with the manner in which a major portion of commercial transactions are conducted in our society today. Williams was charged with, and the jury convicted him of, making a false representation (or, more precisely, a material omission) when he presented his check to the bank with the knowledge that he did not have sufficient funds to cover the check, and with the further intent not to cover that check before it cleared with anything other than another worthless kited check. See n. 2, *supra*. Therefore, his conviction under § 1014 should stand.

(2)

In addition to violating § 1014 by intentionally making a false statement to a federally insured bank for the purpose of obtaining credit, Williams also violated the statute for a separate and independent reason. Although Williams presented to the bank for immediate credit a check which on its face represented an amount exceeding $50,000, he well knew that in fact the check was virtually worthless. In so doing, he "willfully overvalue[d] . . . property or security" for the purpose of obtaining credit.[3] The Court's rejection of the Government's argument with respect to this issue is startling in both its brevity and its concededly technical and "literal" interpretation of the legal value of a check which completely ignores the meaning attributed to checks in the real world.

---

[3] Section 1014 applies to the willful overvaluation of "any . . . property, or security." Again, this element of the statute is cast in broad rather than restrictive terms. Congress plainly intended to proscribe the willful overvaluation of anything of value given to a lending institution. There is no suggestion that the broad generic terms "any . . . property or security"

The very essence of a check-kiting scheme is the successful overvaluation of a security or property which misleads a bank into issuing immediate credit on the assumption that the security or property is in fact valued at the amount represented on its face. A check-kiting scheme is successful only when the bank to which the check is presented assumes that the check is supported by adequate funds in the account upon which it is drawn, and that the face amount of the check is in fact its value. See *supra,* at 296–298; *United States* v. *Payne,* 602 F. 2d 1215, 1217–1218 (CA5 1979). If the bank does not accept the valuation on the face of the check, and instead either inquires into the status of the account on which the check is drawn or waits until the check clears before paying the face amount of the check, the scheme will collapse. Of course, it would be more prudent for a bank to take such precautions just as it would be prudent for banks to inquire carefully into the accuracy of all representations made concerning the value of collateral pledged as security for conventional loans. However, this more prudent course is not always practicable. Moreover, the bank may not believe that such precautions are necessary where, as here, the person presenting the check is the president of another bank presumed to know the illegality, and the drastic adverse conse-

---

were meant to exclude items such as checks presented to obtain a temporary extension of credit. There is no reason to interpret this language to exclude checks.

A check is plainly a form of property under even the majority's most restrictive definition—it is a demand to a drawee to pay a sum certain of money, which is backed by a promise of the drawer to make payment in the event of default. Furthermore, as evidenced by other provisions of Title 18, including the general definitional section, 18 U. S. C. § 8, a check is a type of "security." See, *e. g.*, 18 U. S. C. § 2311.

quences to a bank, of a check-kiting scheme. In any event, a bank's failure to take all possible precautions does not bar prosecution under § 1014, which places the burden of avoiding false representations, at the risk of criminal prosecution, upon the person who seeks the funds of the federally insured bank. Section 1014 forbids a person seeking such funds to make "any" false statement or to "willfully overvalue" any security or property to obtain use of the bank's funds. A kited check is "willfully overvalued" within the meaning of the statute, just as worthless securities presented as collateral for a loan are "willfully overvalued." See *United States* v. *Calandrella*, 605 F. 2d 236 (CA6), cert. denied *sub nom. Kaye* v. *United States*, 444 U. S. 991 (1979).

(3)

The Court does not question that the second element of a § 1014 violation—that Williams presented his kited check for the purpose of influencing the bank to extend him credit in the form of a loan or an advance—is satisfied in this case. Clearly, Williams' conduct was directed at misleading a bank into extending immediate credit. Indeed, the whole purpose of Williams' kiting scheme was to obtain an immediate extension of credit by depositing a check purportedly supported by adequate funds. The banks that extended funds on the basis of Williams' worthless, and not yet collected, checks made an "advance," a "loan," and a "commitment" within the ordinary meaning of these terms. See, *e. g., United States* v. *Payne*, *supra*, at 1218 (check kiting has effect of inducing a credit, a loan, or an advance); *United States* v. *Street*, 529 F. 2d 226, 229 (CA6 1976) (check kiting is the obtaining of "forced credit"); J. White & R. Summers, Uniform Commercial Code 558 (2d ed. 1980); F. Whitney, *supra* n. 1, § 310, pp. 451–452.

If a worthless check is submitted to a bank for reasons other than to obtain an extension of credit, the conduct simply is not check kiting in the ordinary sense of the term, and would not fall within the prohibition of § 1014.[4] However, if a properly instructed jury concludes that a worthless check was submitted in order to obtain immediate credit from a bank, there is no reason to regard the conduct as falling outside the reach of § 1014. The jury that convicted Williams was so instructed, see n. 2, *supra*, and found that Williams' conduct constituted a "false representation" designed to influence the banks into extending him immediate credit.

C

The unambiguous language of § 1014 clearly proscribes conduct commonly referred to as check kiting. This language should be given effect in the absence of clear indications in the legislative history that Congress did not intend to proscribe this conduct. See *United States* v. *Turkette*, 452 U. S., at 580. There are no such indications in the legislative history. To the contrary, the legislative history makes clear that the statute was not limited to borrowers or to loan applications. See S. Rep. No. 1078, 88th Cong., 2d Sess., 4 (1964); H. R. Conf. Rep. No. 91–1784, p. 66 (1970).

The Court finds no indication that Congress intended to exclude check-kiting schemes from the scope of the statute. The Court's brief review of the legislative history to § 1014 does suggest that the primary purpose of the statute is to prohibit misrepresentations in connection with conventional loan applications. However, neither this fact, nor the fact that most convictions under the statute involve such transactions, compels the Court to ignore the broad language and purposes of the statute by interpreting it to cover *only* these transactions. In the past, we have consistently rejected the argument that a criminal statute must be given its narrowest meaning by limiting its scope to effectuate only its primary purpose. See, *e. g.*, *United States* v. *Turkette*, *supra; United States* v. *Naftalin*, 441 U. S. 768 (1979); *United States* v. *Moore*, 423 U. S. 122 (1975).

---

[4] The Court's fears that holding a check-kiting scheme to be covered by § 1014 would entail broad implications, see *ante*, at 286–287, are misguided. If there was no intent on the part of the check kiter to defraud the bank into extending credit, there would be no § 1014 violation. The fact that the Government brought separate counts for each check in the check-kiting scheme does not alter the fact that it was essential to conviction under the jury instructions for the jury to find that petitioner was involved in a check-kiting scheme intentionally designed to defraud the banks.

II

In light of the broad protection Congress intended to accord federally insured institutions against fraudulent or deceptive conduct intended to mislead these institutions into extending credit and the broad, unrestricted statutory language embodied in § 1014, I marvel at the Court's method of interpreting this statute. Indeed, today's decision is utterly incompatible with a number of prior decisions of this Court in which we addressed similar arguments raised by persons convicted under broad federal statutes. See, *e. g.*, *United States* v. *Turkette*, *supra; Rubin* v. *United States*, 449 U. S. 424 (1981); *United States* v. *Naftalin*, *supra; United States* v. *Culbert*, 435 U. S. 371 (1978). In these decisions, we have consistently looked first to the statutory language to determine the scope and purpose of the statute. If it were evident from the face of the statute that the statute was written broadly in order to prohibit certain kinds of conduct which entail specific risks or dangers deemed by the legislators to be sufficiently unacceptable to warrant criminal sanction, we do not frustrate this purpose by distorting either the statutory language employed or the conduct of the accused in the name of the "rule of lenity." See, *e. g.*, *United States* v. *Turkette*, *supra; Rubin* v. *United States*, *supra*.

In contrast with this established approach, the majority today interprets § 1014 without acknowledging the broad statutory language chosen by Congress. This error is compounded by the Court's failure to address the fact that this broad language was intended to proscribe, in generic and disjunctive terms, precisely the type of conduct of which Williams was found guilty—intentionally misleading the bank into extending him credit—and to protect federally insured institutions from precisely the risk of loss to which Williams' conduct subjected them. Ignoring these factors, the majority begins its analysis by employing an oversimplified, concededly technical and literal interpretation of the "legal definition" of a check. In then observes that Congress never explicitly stated that it intended the statute to cover check-kiting schemes. It concludes that in the absence of such an express statement, the rule of lenity requires that the statute not cover these schemes.

The majority's approach to the question of statutory construction is a prime example of what this Court has time and again said the rule of lenity does *not* entail:

> "The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. As was said in *United States* v. *Gaskin*, 320 U. S. 527, 530, the canon 'does not require distortion or nullification of the evident meaning and purpose of the legislation.' Nor does it demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers." *United States* v. *Brown*, 333 U. S. 18, 25–26 (1948) (quoted in *United States* v. *Turkette*, *supra*, at 588, n. 10, and *United States* v. *Moore*, *supra*, at 145).

If the broad language and evident purpose of the statute had been given effect, there would have been no need to parse the legislative history for affirmative evidence that Congress "demand[ed] a broader reading of the statute." *Ante*, at 288. Holding that § 1014 reaches check kiting does not produce an absurd result, render the statute internally contradictory, or diverge from legislative policy. To the contrary, Congress' policy, manifest in § 1014 and elsewhere throughout Title 18 of the United States Code, is that federal criminal sanctions are necessary to provide federally insured banking institutions with comprehensive protection against practices that cause risk of loss. The Court's construction of § 1014, on the other hand, results in a large loophole in the protection afforded these institutions by limiting the statute's application to formal loan transactions. After today's decision, a bank's protection against false statements intended to influence credit transactions depends not upon whether a misrepresentation was made in connection with a loan, advance, or commitment, but rather upon whether a court concluded that the transaction was "traditional" or that Congress specified that transaction by name in a committee report.

It is worth observing that in this case, none of the general justifications for applying the rule of lenity are present. In *Huddleston* v. *United States*, 415 U. S. 814, 831 (1974), this Court explained that the rule of lenity "is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property." There is no question that Williams, a bank president, knew that his check-kiting scheme was wrongful. The majority's attempt to buttress its decision by arguing that check kiting has traditionally been regulated by the States, and that federal enforcement might interfere with this regulation, is completely unjustified.[5] The Federal Government, which provides deposit insurance, has a paramount interest in safeguarding the financial integrity of federally insured banking institutions. The Courts of Appeals have been virtually unanimous in holding that check kiting is subject to federal prosecution under the mail and wire fraud statutes, see, *e. g., United States* v. *Giordano*, 489 F. 2d 327 (CA2 1973); *United States* v. *Constant*, 501 F. 2d 1284 (CA5 1974), cert. denied, 420 U. S. 910 (1975), and the majority apparently does not question these decisions. Therefore, a check-kiting prosecution under § 1014, which by its terms applies only to federally insured institutions, results in no new inroad upon state criminal jurisdiction.

---

[5] In Title 18, Congress has provided comprehensive criminal sanctions to protect federally insured institutions. See, *e. g.*, 18 U. S. C. §§ 212, 213 (loans or gratuities offered to bank examiners by bank officials; acceptance of same by examiners); 18 U. S. C. § 493 (forging, counterfeiting, or

Under the version of the rule of lenity adopted today, conduct which falls within the literal terms of a broad statute, which proscribes in disjunctive and generic terms the type of conduct at issue, and which is designed to protect against the very risk created by such conduct, escapes the reach of the statute unless Congress specifies that conduct by name in the statute or describes it in detail in the statute's legislative his-

---

passing bonds and obligations); 18 U. S. C. § 656 (theft from banks by bank examiners); 18 U. S. C. § 709 (1976 ed. and Supp. IV) (false advertising that bank deposits are insured by Federal Deposit Insurance Corporation). Congress has sought to protect fully the integrity of the federal insurance program, and the protection against check kiting afforded by § 1014 is consistent with this scheme. See, *e. g., United States* v. *Bush*, 599 F. 2d 72, 75 (CA5 1979); *United States* v. *Pinto*, 646 F. 2d 833, 838 (CA3), cert. denied, 454 U. S. 816 (1981); *United States* v. *Stoddart*, 574 F. 2d 1050, 1053 (CA10 1978). Construing § 1014 to cover check kiting does not displace the authority of the States. Rather, it complements state law enforcement in an area where the federal interest is substantial. See *United States* v. *Turkette*, 452 U. S. 576, 586, n. 9 (1981) (interpreting the Racketeer Influenced and Corrupt Organizations statute) ("[T]he States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute [violations of federal law], is no restriction on the separate administration of criminal justice by the States").

tory. In order to find Williams' conduct outside the scope of § 1014, the majority ignores the function of a check in today's society. The rule of lenity has never been interpreted to require this kind of result. I am at a loss to explain why the Court adopts this approach today and consequently turns the rule of lenity on its head. Accordingly, I dissent.

ASARCO INC. *v.* IDAHO STATE TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF IDAHO

No. 80-2015. Argued April 19, 1982—Decided June 29, 1982

Held: The State of Idaho may not constitutionally include within the taxable income of appellant nondomiciliary parent corporation doing some business (primarily silver mining) in the State a portion of intangible income (dividends, interest payments, and capital gains from the sale of stock) that appellant received from subsidiary corporations having no other connection with the State. Pp. 315–330.

(a) As a general principle, a State may not tax value earned outside its borders. "[T]he linchpin of apportionability in the field of state income taxation is the unitary-business principle." *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 439; *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 223. Pp. 315–320.

(b) Here, based on the findings in the state trial court and the undisputed facts, appellant succeeded in proving that no unitary business relationship existed between appellant and its subsidiaries. Pp. 320–324.

(c) To have, as Idaho proposes, corporate *purpose* define unitary business—*i. e.*, to consider intangible income as part of a unitary business if the intangible property (shares of stock) is "acquired, managed or disposed of for purposes relating or contributing to the taxpayer's business"—would destroy the concept of unitary business. Such a definition, which would permit nondomiciliary States to apportion and tax dividends "[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State," *Mobil Oil Corp., supra*, at 442, cannot be accepted consistently with recognized due process standards. While the dividend-paying subsidiaries in this case "ad[d] to the riches" of appellant, *Wallace* v. *Hines*, 253 U. S. 66, 70 (1920), they are "discrete business enterprise[s]" that in "any business or economic sense" have "nothing to do with the activities" of appellant in Idaho. *Mobil Oil Corp., supra*, at 439–442. Therefore, there is no "rational relationship between [appellant's dividend] income attributed to the State and the intrastate values of the enterprise." *Mobil Oil Corp., supra*, at 437. The Due Process Clause bars Idaho's effort to levy upon income that is not properly within the reach of its taxing power. Pp. 325–329.

(d) Under the same unitary-business standard applied to the dividend income in question, Idaho's attempt to tax the interest and capital gains income derived from its subsidiaries also violates the Due Process Clause. Pp. 329–330.

102 Idaho 38, 624 P. 2d 946, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 331. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 331.

George W. Beatty argued the cause for appellant. With him on the briefs were *C. Rudolf Peterson*, *William L. Goldman*, *James A. Riedy*, *Philip E. Peterson*, and *Alexander J. Gillespie, Jr.*

Theodore V. Spangler, Jr., Deputy Attorney General of Idaho, argued the cause for appellee. With him on the brief was *David H. Leroy*, Attorney General.*

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the State of Idaho constitutionally may include within the taxable income of a nondomiciliary

---

*Briefs of *amici curiae* urging affirmance were filed for the State of Illinois by *Tyrone Fahner*, Attorney General, *Fred H. Montgomery*, Special Assistant Attorney General, and *Lloyd B. Foster;* and for the Multistate Tax Commission et al. by *William D. Dexter; Wilson L. Condon*, Attorney General of Alaska; *J. D. MacFarlane*, Attorney General of Colorado; *Carl R. Ajello*, Attorney General of Connecticut; *Richard S. Gebelein*, Attorney General of Delaware; *David H. Leroy*, Attorney General of Idaho, and *Theodore V. Spangler, Jr.*, Deputy Attorney General; *Linley E. Pearson*, Attorney General of Indiana; *Robert T. Stephan*, Attorney General of Kansas; *Stephen H. Sachs*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *Frank K. Kelley*, Attorney General of Michigan; *Warren R. Spannaus*, Attorney General of Minnesota; *John Ashcroft*, Attorney General of Missouri; *Paul L. Douglas*, Attorney General of Nebraska; *Gregory H. Smith*, Attorney General of New Hampshire; *Jeff Bingaman*, Attorney General of New Mexico; *Rufus L. Edmisten*, Attorney General of North Carolina, and *M. C. Banks*, Deputy Attorney General; *Robert O. Welfald*, Attorney General of North Dakota, and *Albert R. Hausauer*, Assistant Attorney General; *Dave Frohnmayer*, Attorney General of Oregon; and *David L. Wilkinson*, Attorney General of Utah.

John J. Easton, Attorney General of Vermont, and *Paul P. Hanlon* filed a brief for the State of Vermont as *amicus curiae*.

parent corporation doing some business in Idaho a portion of intangible income—such as dividend and interest payments, as well as capital gains from the sale of stock—that the parent receives from subsidiary corporations having no other connection with the State.

I

This case involves corporate income taxes that appellee Idaho State Tax Commission sought to levy on appellant ASARCO Inc. for the years 1968, 1969, and 1970. ASARCO is a corporation that mines, smelts, and refines in various States nonferrous metals such as copper, gold, silver, lead, and zinc. It is incorporated in New Jersey and maintains its headquarters and commercial domicile in New York. ASARCO's primary Idaho business is the operation of a silver mine. It also mines and sells other metals and operates the administrative office of its northwest mining division in Idaho. According to the appellee's tax calculations, approximately 2.5% of ASARCO's total business activities take place in Idaho. App. 59a, 67a, and 75a.

During the years in question, ASARCO received three types of intangible income of relevance to this suit.[1] First, it collected dividends from five corporations in which it owned major interests: M. I. M. Holdings, Ltd.; General Cable Corp.; Revere Copper and Brass, Inc.; ASARCO Mexicana, S. A.; and Southern Peru Copper Corp.[2] Second,

---

[1] ASARCO also received other intangible income, but the proper tax treatment of that income is not at issue in this case.

[2] M. I. M. Holdings, Ltd., is a publicly owned corporation engaged in the mining, milling, smelting, and refining of nonferrous metals in Australia and England. ASARCO owned about 53% of M. I. M.'s stock during the period in question. General Cable Corp. and Revere Copper and Brass, Inc., are publicly owned companies that respectively fabricate cables and manufacture copper wares. ASARCO owned about 34% of the stock of each. ASARCO Mexicana, S. A., engages in Mexico in the same general line of business as does ASARCO in the United States. ASARCO owned 49% of Mexicana. Southern Peru Copper Corp. mines and smelts

ASARCO received interest income from three sources: from Revere's convertible debentures; from a note received in connection with a prior sale of Mexicana stock; and from a note received in connection with a sale of General Cable Stock. Third, ASARCO realized capital gains from the sale of General Cable and M. I. M. stock.

In 1965, Idaho adopted its version of the Uniform Division of Income for Tax Purposes Act (UDITPA).[3] See Idaho Code § 63-3027 (1976 and Supp. 1981); 7A U. L. A. 91 (1978). Under this statute, Idaho classifies corporate income from intangible property as either "business" or "nonbusiness" income. "Business" income is defined to include income from intangible property when "acquisition, management, or disposition [of the property] constitute[s] integral or necessary parts of the taxpayers' trade or business operations."[4] Idaho apportions such "business" income according

---

copper in Peru. ASARCO owned about 51.5% of Southern Peru during the time at issue.

[3] The UDITPA is a tax allocation system approved in 1957 by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association. See 7A U. L. A. 91 (1978). At least 23 States have adopted substantially all of the UDITPA to date. See *id.*, at 10 (Supp. 1982); Brief for State of Illinois as *Amicus Curiae* 1-2. The UDITPA has been adopted as Article IV of the Multistate Tax Compact. See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 457-458, n. 6 (1978).

[4] Idaho Code § 63-3027(a)(1) (Supp. 1981). The complete definition provides that "'[b]usiness income' means income arising from transactions and activity in the regular course of the taxpayers' trade or business and includes income from the acquisition, management, or disposition of tangible and intangible property when such acquisition, management, or disposition constitute[s] *integral or necessary parts of the taxpayers' trade or business operations*. Gains or losses and dividend and interest income from stock and securities of any foreign or domestic corporation shall be presumed to be income from intangible property, the acquisition, management, or disposition of which constitute an integral part of the taxpayers' trade or business; such presumption may only be overcome by clear and convincing evidence to the contrary." *Ibid.* (emphasis added). See UDITPA, § 1(a), 7A U. L. A. 93 (1978).

to a three-factor formula and includes this apportioned share of "business" income in the taxpayer's taxable Idaho income.[5] "Nonbusiness" income, on the other hand, is defined as "all income other than business income." Idaho Code § 63-3027(a)(4) (Supp. 1981). Idaho allocates intangible "nonbusiness" income entirely to the State of the corporation's commercial domicile instead of apportioning it among the States in which a corporate taxpayer owns property or carries on business.[6]

Idaho is a member of the Multistate Tax Compact, an interstate taxation agreement concerning state taxation of multistate businesses. The Compact established the Multistate Tax Commission, which is composed of the tax administrators from the member States.[7] Article VIII of the Compact provides that any member State may request that the Commission perform an audit on its behalf. See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 457 (1978) (upholding the Compact against a facial attack on Compact and Commerce Clauses and Fourteenth Amendment grounds).

---

[5] "All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three (3)." Idaho Code § 63-3027(i) (Supp. 1981).

"The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period." § 63-3027(j). "The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the tax period." § 63-3027(m). "The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period." § 63-3027(o).

[6] "Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state, unless such gains and losses constitute business income as defined in this section." Idaho Code § 63-3027(f)(3) (Supp. 1981). "Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state unless such interest or dividends constitute business income as defined in this section." § 63-3027(g).

Idaho defines "commercial domicile" as "the principal place from which the trade or business of the taxpayer is directed or managed." § 63-3027(a)(2).

In 1971, the Multistate Tax Commission audited ASARCO's tax returns for the years in question on behalf of six States, including Idaho. The auditor recommended adjusting ASARCO's tax computations in several respects. As accepted by the Idaho State Tax Commission and as relevant to the present dispute, the auditor first "unitized"—or treated as one single corporation—ASARCO and six of its *wholly* owned subsidiaries.[8] As a consequence of unitization, the auditor combined ASARCO's income with that of these six subsidiaries and disregarded (as intracompany accounting transfers) the subsidiaries' dividend payments to ASARCO. Cf. *United States Steel Corp.* v. *Multistate Tax Comm'n*, *supra*, at 473, n. 25. The auditor listed five factors thought to justify unitizing treatment. First, ASARCO owned a majority (in fact, all) of the stock of each subsidiary. Second, "ASARCO, with its subsidiaries, conducts a vertically integrated non-ferrous metals operation. This is evidenced by the flow from the mines to the smelters to the refineries and ultimately to the sales made by the New York office." App. 88a. Third, "ASARCO and its subsidiaries have interlocking officers and directors, which enables ASARCO to control the major management decisions of each subsidiary." *Ibid.* Fourth, sales between the companies were numerous, making it "apparent . . . that the companies supplied markets to each other . . . ." *Id.*, at 89a. And finally, various services were provided to the ASARCO group either by ASARCO or by subsidiaries specifically set up for such a purpose.[9] The propriety of this treatment of the six wholly owned subsidiaries is not an issue before us.

---

[7] Presently 19 States and the District of Columbia have joined the Compact as full members. Eleven States have joined as associate members. Brief for Multistate Tax Commission and Participating States as *Amici Curiae* 2.

[8] Idaho law provides that "two . . . or more corporations the voting stock of which is more than fifty percent . . . owned directly or indirectly by a common owner or owners may, when necessary to accurately reflect income, be considered a single corporation." Idaho Code § 63–3027(s) (Supp. 1981).

The six unitized subsidiaries are Federated Metals of Canada; ASARCO Mercantile Co.; Enthone, Inc.; International Mining Co.; Lone Star Lead Construction Corp.; and Northern Peru Mining Corp.

The auditor also stated that Southern Peru Copper Corp. and Southern Peru Copper Sales Corp. "were deemed unitary and were combined only for those states in which ownership of less than 80% presents no problem." App. 88a. See *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 435, n. 12 (1980). These two corporations were not "deemed unitary" in Idaho.

The auditor found the situation to differ with respect to ASARCO's interest in M. I. M., General Cable, Revere, Mexicana, and Southern Peru. This judgment planted the seed of the current dispute. As to these five companies, the auditor determined that the links with ASARCO were not sufficient to justify unitary treatment. Nonetheless, he found that ASARCO's receipt of dividends from each of these did constitute "business" income to ASARCO. See n. 4, *supra.* The auditor similarly classified the interest and capital gains income at issue in this case. These categories of income also were added in ASARCO's total income to be apportioned among the various States in which ASARCO was subjected to an income tax.

The Idaho State Tax Commission adopted the auditor's adjustments in an unreported decision. App. to Juris. Statement 46a. In rejecting ASARCO's challenge to the auditor's unitized treatment of the six wholly owned corporations, see n. 8, *supra*, the Commission stated that it was "quite clear from the evidence produced at the hearing that [ASARCO's] business activities are so inter-related as to defy measurement by separate accounting . . . ." App. to Juris. Statement 49a–50a. The Commission likewise upheld the auditor's conclusion that the dividends presently at issue were properly treated as apportionable "business" income. It consequently assessed tax deficiencies against ASARCO of $92,471.88 for 1968, $111,292.44 for 1969, and $121,750.76 for 1970, plus interest.

---

[9] The auditor noted that ASARCO Mercantile bought and sold equipment for the subsidiaries and that International Metals acted as ASARCO's foreign sales agent. He further observed that exploration, research and development, insurance procurement, and tax preparation were performed jointly for most or all of these companies. Finally, he stated that ASARCO's audit staff examined the operations of these subsidiaries to enable "ASARCO to know whether the subsidiaries are operating along the lines set down by its management." App. 90.

On ASARCO's petition for review, the State District Court upheld the Commission's unitized treatment of the six subsidiaries in an unpublished opinion. The court, however, overruled the Commission's determination that the disputed dividends, interest, and capital gains constituted "business" income, on the reasoning that this income did not come from property or activities that were "an integral part of [ASARCO's] trade or business." Idaho Code § 63–3027(a)(1) (Supp. 1981). In the court's view, "if the dividend income from other corporations is an integral part of the business of [ASARCO] . . . they should be unitized and all matters considered and[,] if they are not[,] . . . the income is not business income but is [nonapportionable] non business income." App. to Juris. Statement 37a.

The Commission, but not ASARCO, appealed to the Idaho Supreme Court. That court held that the trial court had erred by excluding from "business" income ASARCO's receipt of dividends, interest, and capital gains as a result of its owning stock in the five corporations.[10] *American Smelting*

---

[10] The Idaho Supreme Court also ruled that ASARCO's receipt of certain rents and royalties, as well as its receipt of dividends from Companía American Smelting, S. A., constituted apportionable "business" income. It further upheld the trial court's "nonbusiness" income classification with

& Refining Co. v. *Idaho State Tax Comm'n*, 99 Idaho 924, 935–937, 592 P. 2d 39, 50–52 (1979). In response to ASARCO's constitutional arguments, the court decided that this tax treatment withstood attack under the Commerce and Due Process Clauses. We vacated and remanded the case for reconsideration in light of our decision in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425 (1980). *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 445 U. S. 939 (1980). The Idaho Supreme Court reinstated its previous opinion in a brief *per curiam* order on March 4, 1981. 102 Idaho 38, 624 P. 2d 946. We noted probable jurisdiction, 454 U. S. 812 (1981), and we now reverse.

II

As a general principle, a State may not tax value earned outside its borders. See, *e. g.*, *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 80–81 (1938).[11] The broad inquiry in a case such as this, therefore, is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940).

Our application of this general principle in this case is guided by two of our recent decisions. In *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, *supra*, the taxpayer conducted "an integrated petroleum business," 445 U. S., at

---

respect to dividends received by ASARCO from Lake Asbestos of Quebec, ASARCO International Corp., Hecla Mining Co., Kennecott Copper Co., Phelps-Dodge, and United Park City Mines. *American Smelting & Refining Co.* v. *Idaho State Tax Comm'n*, 99 Idaho 924, 935–937, 592 P. 2d 39, 50–52 (1979).

These rulings are not disputed here.

[11] See Rudolph, State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups, 25 Tax L. Rev. 171, 181 (1970).

428, that included international petroleum exploration, production, refining, transportation, distribution, and sale of petroleum, as well as related chemical and mining enterprises. Much of its business abroad was conducted through wholly or partly owned subsidiaries. The State of Vermont imposed a corporate income tax on that portion of Mobil's total income that the State attributed to Mobil's Vermont activity, which was confined to the wholesale and retail marketing of petroleum. The State sought to include within Mobil's apportionable Vermont income its receipt of dividends from its subsidiaries and affiliates that operated abroad. Mobil protested that the State could not properly apportion and tax this "foreign source" dividend income.

For present purposes, our analysis in *Mobil* began with the observation that Mobil's principal dividend payors were part of Mobil's integrated petroleum business. Although Mobil was "unwilling to concede the legal conclusion" that activities by these dividend payors formed part of Mobil's "'unitary business,'" it "offered no evidence that would undermine the conclusion that most, if not all, of its subsidiaries and affiliates contribute[d] to [Mobil's] worldwide petroleum enterprise." *Id.*, at 435.

The Court next stated that due process limitations on Vermont's attempted tax would be satisfied if there were "a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Id.*, at 436–437, citing *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272–273 (1978); *National Bellas Hess, Inc.* v. *Illinois Dept. of Revenue*, 386 U. S. 753, 756 (1967); *Norfolk & Western R. Co.* v. *Missouri Tax Comm'n*, 390 U. S. 317, 325 (1968). And we said that these limitations would not be contravened by state apportionment and taxation of income that were determined by geographic accounting to have arisen from a different State "so long as the intrastate and extrastate activities formed part of *a single unitary business*." 445 U. S., at 438 (emphasis added).

The *Mobil* Court explicated the limiting "unitary business" principle by observing that geographic accounting, in purporting to isolate income received in various States, "may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale." *Ibid.* The fact that "these factors of profitability arise from the operation of the business as a whole," *ibid.*, therefore could justify a State's otherwise impermissible inclusion of corporate income derived from corporate activities beyond the State's borders. The Court thus stated:

> "*[T]he linchpin of apportionability in the field of state income taxation is the unitary-business principle.* In accord with this principle, what appellant must show, in order to establish that its dividend income is not subject to an apportioned tax in Vermont, is that the income was earned in the course of activities unrelated to the sale of petroleum products in that State. [Mobil] has made no effort to demonstrate that the foreign operations of its subsidiaries and affiliates are distinct in any business or economic sense from its petroleum sales activities in Vermont. Indeed, all indications in the record are to the contrary, since it appears that these foreign activities are part of [Mobil's] integrated petroleum enterprise. In the absence of any proof of *discrete business enterprise,* Vermont was entitled to conclude that the dividend income's foreign source did not destroy the requisite nexus with in-state activities." *Id.*, at 439–440 (emphasis added and footnote omitted).

We consequently rejected Mobil's constitutional challenge to Vermont's tax. In so doing, however, we cautioned that we did

> "not mean to suggest that *all* dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does business. Where the business activities of the dividend payor have *nothing to do* with the activities of the

> recipient in the taxing State, *due process considerations might well preclude apportionability, because there would be no underlying unitary business.*" *Id.*, at 441–442 (emphasis added).

We soon had occasion to reiterate these principles. Three months after *Mobil*, we decided *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207 (1980). In *Exxon*, "a vertically integrated petroleum company," *id.*, at 210, explored for, produced, refined, and marketed petroleum and related products. Although Exxon's activities in Wisconsin were confined to marketing, the State sought to apportion and tax Exxon's income from nonmarketing activities in the United States.

Exxon disputed the propriety of this treatment. The Wisconsin Tax Appeals Commission agreed with the objection on the basis of its conclusion that Exxon's "three main functional operating departments—Exploration and Production, Refining, and Marketing—were *separate* unitary businesses." *Id.*, at 215 (emphasis added). The Commission found that the tax as applied "'had the effect of imposing a tax on [Exxon's] exploration and on its refining net income, all of which was derived solely from operations outside the State of Wisconsin and which had no integral relationship to [Exxon's] marketing operations within Wisconsin.'" *Ibid.* On appeal, however, the Circuit Court for Dane County held that Exxon's three main functional operating departments were all part of a *single* unitary business. The Wisconsin Supreme Court agreed.[12]

---

[12] That court examined Exxon's organizational structure and business operations. It found that Exxon's full utilization of its production and refining functions were dependent on its marketing system, which encompassed Exxon's Wisconsin activities. The court therefore agreed with the Circuit Court for Dane County that Exxon's marketing in Wisconsin was an integral part of one unitary business and, consequently, that its total corporate income derived from the United States was subject to Wisconsin's apportioned taxation. See 447 U. S., at 217–219.

In reviewing the case, this Court unanimously agreed with the State Commission and the two state courts that the decisive concept in the case was that of a unitary business. Significantly, we repeated *Mobil's* teaching that "[t]he 'linchpin of apportionability' for state income taxation of an interstate enterprise is the 'unitary-business principle.'" *Id.*, at 223, quoting *Mobil*, 445 U. S., at 439. We also repeated:

> "In order to exclude certain income from the apportionment formula, the company must prove that 'the income was earned in the course of activities unrelated to the sale of petroleum products in that State.' . . . The court looks to the 'underlying economic realities of a unitary business,' and the income must derive from 'unrelated business activity' which constitutes a 'discrete business enterprise,' 445 U. S., at 441, 442, 439." 447 U. S., at 223–224.

Examining the facts, the Court found that Exxon was "a highly integrated business which benefits from an umbrella of centralized management and controlled interaction." *Id.*, at 224.[13] We rejected the company's protest because "[w]e agree[d] with the Wisconsin Supreme Court that Exxon [was] such a unitary business and that Exxon has not carried its burden of showing that its functional departments are 'discrete business enterprises'. . . ." *Ibid.*[14]

---

[13] It was noted that Exxon's Coordination and Services Management office "provided many essential corporate services for the entire company, including the coordination of the refining and other operational functions 'to obtain an optimum short range operating program.' . . . Many of the items sold by appellant in Wisconsin were obtained through a centralized purchasing office in Houston whose obvious purpose was to increase overall corporate profits through bulk purchases and efficient allocation of supplies among retailers. . . . Even the gasoline sold in Wisconsin was available only because of an exchange agreement with another company arranged by the Supply Department, part of Coordination and Services Management, and the Refining Department. Similarly, sales were facilitated through the use of a uniform credit card system, uniform packaging, brand names, and promotional displays, all run from the national headquarters." *Id.*, at 224.

III

In this case, ASARCO claims that it has succeeded, where the taxpayers in *Mobil* and *Exxon* failed, in proving that the dividend payors at issue are not part of its unitary business, but rather are "discrete business enterprises." 447 U. S., at 224. We must test this contention on the record before us.

A

The closest question is posed by ASARCO's receipt of dividends from Southern Peru. ASARCO is one of Southern Peru's four shareholders, holding 51.5% of its stock.[15]

---

[14] The unitary-business principle applied in *Mobil* and *Exxon* is not new. It has been a familiar concept in our tax cases for over 60 years. See *United States Steel Corp.* v. *Multistate Tax Comm'n,* 434 U. S., at 473, n. 25, 474, n. 26; *General Motors Corp.* v. *Washington,* 377 U. S. 436, 439 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 460 (1959); *Butler Bros.* v. *McColgan,* 315 U. S. 501, 508 (1942); *Ford Motor Co.* v. *Beauchamp,* 308 U. S. 331, 336 (1939); *Norfolk & Western R. Co.* v. *North Carolina ex rel. Maxwell,* 297 U. S. 682, 684 (1936); *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell,* 283 U. S. 123, 132–133 (1931); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U. S. 271, 282 (1924). Cf. *Burnet* v. *Aluminum Goods Mfg. Co.,* 287 U. S. 544, 550 (1933); *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 120–121 (1920); *Wallace* v. *Hines,* 253 U. S. 66, 69 (1920); *Fargo* v. *Hart,* 193 U. S. 490, 499–500 (1904); *Adams Express Co.* v. *Ohio State Auditor,* 165 U. S. 194, 221–222 (1897); *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S. 185, 219, 222, 223–224 (1897).

A review of our cases before *Mobil* made plain that "[f]ormulary apportionment, which takes into account the entire business income of a multistate business in determining the income taxable by a particular state, is constitutionally permissible only in the case of a unitary business." Rudolph, *supra* n. 11, at 183–184.

[15] The other shareholders are Phelps Dodge, 16%; Newmont Mining, 10.25%; and Cerro Corp., 22.25%. App. 86a. Either these large compa-

Southern Peru produces smelted but unrefined "blister copper" in Peru, and sells 20–30% of its output to the Southern Peru Copper Sales Corp.[16] The remainder of Southern Peru's output is sold under contracts to its shareholders in proportion to their ownership interests. Southern Peru sold about 35% of its output to ASARCO, App. 89a, at prices determined by reference to average representative trade prices quoted in a trade publication and over which the parties had no control.[17] *Id.*, at 125a–126a; 99 Idaho, at 928, 592 P. 2d, at 43.

ASARCO's majority interest, if asserted, could enable it to control the management of Southern Peru. The Idaho State

---

nies or their parents were traded on the New York Stock Exchange at the time in question.

[16] Southern Peru Copper Sales Corp. in turn sells the copper to European customers. These European sales are handled in this manner to preserve Southern Peru's favorable federal tax status as a Western Hemisphere Trading Corporation.

Southern Peru Copper Sales Corp.'s stock is owned in the same manner as is Southern Peru's. Unlike Southern Peru, however, Southern Peru Copper Sales Corp. has no employees of its own. Sales are generally transacted by ASARCO's New York office, for which that office earns a sales commission. *Ibid.*

[17] These sales ranged between $44 and $65 million for the years in question. *Id.*, at 89a. There was evidence that ASARCO could replace this output contract "[w]ithin a short time" if it were lost, and that loss of ASARCO's ownership in Southern Peru would not cause the loss of the output contract. *Id.*, at 128a.

Southern Peru has a "staff that you'd expect a major corporation to have." *Id.*, at 122a. ASARCO provided Southern Peru with purchasing service outside of Peru, traffic service for its exports and imports outside of Peru, and preparation service for its United States tax return. *Id.*, at 123a–124a. The contract for ASARCO's purchasing services provided for payment of this service on the basis of a fixed fee plus a commission based on the dollar volume of purchases. *Id.*, at 124a. ASARCO received separate "negotiated fair fee[s]" for its tax and traffic services. *Ibid.* Southern Peru has its own purchasing, traffic, and tax departments in Peru. *Id.*, at 123a.

Tax Commission, however, found that Southern Peru's "remaining three shareholders, owning the remainder of the stock, refuse[d] to participate in [Southern Peru] unless assured that they would have a way to assure that management would not be completely dominated by ASARCO." App. to Juris. Statement 55. Consequently ASARCO entered a management agreement giving it the right to appoint 6 of Southern Peru's 13 directors. The other three shareholders also appointed six directors. *Ibid.* The thirteenth and final director is appointed by the joint action of either the shareholders or the first 12 directors. *Ibid.;* App. 121a. Southern Peru's bylaws provide that eight votes are required to pass any resolution, *ibid.* and its articles and bylaws can be changed only by unanimous consent of the four stockholders.

In its unreported opinion, the state trial court concluded that this management contract "insures that [ASARCO] will not be able to control [Southern Peru]." App. to Juris. Statement 43a. It likewise found that Southern Peru "operates independently of [ASARCO]." *Id.*, at 42a. The court reached this conclusion after hearing testimony that ASARCO did not "control Southern Peru in any sense of that term," App. 121a, and that Southern Peru did not "seek direction or approval from ASARCO on major decisions." *Id.*, at 124a. Idaho does not dispute any of these facts. In view of the findings and the undisputed facts, we conclude that ASARCO's Idaho silver mining and Southern Peru's autonomous business are insufficiently connected to permit the two companies to be classified as a unitary business.

B

Under the principles of our decisions, the relationship of each of the other four subsidiaries to ASARCO falls far short of bringing any of them within its unitary business. M. I. M. Holdings engages in the mining, milling, smelting, and refining of copper, lead, zinc, and silver in Australia. The company also operates a lead and zinc refinery in England. During the years in question M. I. M. sold only about 1%

of its output to ASARCO, for sums in the range of $0.2 to $2.2 million. *Id.*, at 43a–47a. It appears that these sales were on the open market at prevailing market rates. ASARCO owns 52.7% of M. I. M.'s stock, and the rest is widely held. Although ASARCO has the control potential to manage M. I. M., no claim is made that it has done so.[18] As an ASARCO executive explained, it never even elected a member of M. I. M.'s board:

> "This company has been very successful in staffing the corporation with Australian people and [they have] been able to run this company by themselves and, therefore, in consequence of the nationalistic feeling which develops in most of such developing countries we have not exercised any right we might have to elect a director to the board of the company." *Id.*, at 132a.

In addition to forgoing its right to elect directors, ASARCO similarly has taken no part in the selection of M. I. M.'s officers—a function of the board of directors. Nor do the two companies have any common directors or officers. *Id.*, at 34a, 40a. The state trial court found that M. I. M. "operates entirely independently of and has minimal contact with" ASARCO. App. to Juris. Statement 43a. As the business relation also is nominal, it is clear that M. I. M. is merely an investment. See, *e. g.*, Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 Hastings L. J. 42, 52–53 (1960).

General Cable and Revere Copper, large publicly owned companies, fabricate metal products. Both are ASARCO customers.[19] But ASARCO held only minority interests, owning approximately 34% of the outstanding common shares of each. The remaining shares—listed on the New York Stock Exchange—are widely held. App. 135a. The two companies occupy parallel positions with respect to ASARCO as a result of a 1961 Department of Justice antitrust suit against ASARCO. The suit was based on ASARCO's interests in each. In 1967, ASARCO consented to a decree that prohibited it from maintaining common officers in these companies, voting its stock in them, selling the companies copper at prices below those quoted to their competition, and from acquiring stock in any other copper fabricator. *Id.*, at 96a. Neither Revere's nor General Cable's management seeks direction or approval from ASARCO on operational or other management decisions.[20] *Id.*, at 137a.

---

[18] M. I. M. did use an ASARCO melting furnace patent for which it pays a price "the same that would be paid by any other company using it." *Id.*, at 133a.

[19] For the years in question, Revere's purchases averaged 3–4% of ASARCO's sales and totalled from $17 to $29 million. *Id.*, at 27a. Revere in turn sold ASARCO from 1 to 2% of its total output, which totalled $4–$6 million. *Id.*, at 43a–47a. General Cable's purchases accounted for

Mexicana mines and smelts lead and copper in Mexico. Originally it was a wholly owned subsidiary of ASARCO, but a change in Mexican law required ASARCO to divest itself of 51% of Mexicana's stock in 1965. This stock is now publicly held by Mexican nationals. The record does not reveal whether ASARCO and Mexicana have any common directors. The state trial court found, however, that Mexicana "operates independently of [ASARCO]," App. to Juris. Statement 43a, and the Idaho Supreme Court stated that "Mexicana does not seek approval from ASARCO concerning major policy decisions . . . ." 99 Idaho, at 929, 592 P. 2d, at 44.[21]

---

approximately 6% of ASARCO's sales and ranged from $31 to $47 million. *Id.*, at 27a. ASARCO's purchases from General Cable averaged 0.1% of General Cable's total sales and ranged between $0.3 and $0.5 million. *Id.*, at 43a–47a.

[20] Both Revere and General Cable utilized ASARCO's stock transfer department on a contract basis, and Revere licensed one patent from ASARCO for a "fair price." *Id.*, at 136a.

In 1970, ASARCO was compelled, apparently by the Department of Justice, to divest itself of all its General Cable stock. *Id.*, at 95a.

[21] ASARCO sold Mexicana none of its output in 1968 and insignificant amounts (totalling $24,169 and $14,902) in 1969 and 1970. *Id.*, at 27a. Mexicana apparently did not sell ASARCO any of its output during the

C

Idaho does not dispute the foregoing facts. Neither does it question that a unitary business relationship between ASARCO and these subsidiaries is a necessary prerequisite to its taxation of the dividends at issue. *E. g.*, Brief for Appellee 10 ("When income is earned from activities which are part of a unitary business conducted in several states, then the requirement that the income bear relation to the benefits and privileges conferred by the several states has been met"). See also Tr. of Oral Arg. 25 ("[W]hen intangible assets such as, for example, shares of stock, are found to be a part of a taxpayer's own unitary business, . . . there is no logical or constitutional reason why the income from those same intangibles should be treated any differently than any other business income that that taxpayer might earn"). Rather the State urges that we expand the concept of a "unitary business" to cover the facts of this case.

---

time in question. *Id.*, at 43a–47a. For a commission, ASARCO does act as a contract sales agent for Mexicana in the United States. *Id.*, at 131a. This contract would continue if ASARCO lost its investment interest in Mexicana. *Ibid.* ASARCO also provides technical services to Mexicana for a fee. *Id.*, at 130a; 99 Idaho, at 929, 592 P. 2d, at 44.

The dissent's perception of some of the facts differs substantially from the record. It speculates that ASARCO's unitary-business experience "must" have aided ASARCO's stock investments, *post*, at 336, despite the undisputed trial court finding that ASARCO's stock investments were "not integral to nor a necessary part of [ASARCO's] business operation . . . ." App. to Juris. Statement 44a. See also *id.*, at 43a. It maintains that—"[f]or all we know"—ASARCO's stock investments were interim uses of idle funds "accumulated for the future operation of [ASARCO's] own primary business." *Post*, at 337. The trial court, however, found that ASARCO "has never been required to utilize its stock as security for borrowing of working capital, acquiring stock or securities in other companies or to support any bond issues." App. to Juris. Statement 41a. Moreover, ASARCO was found to have "sufficient cash flow from mining to provide operating capital for all mining operations without reliance upon cash flow from . . . income from intangibles." *Ibid.*

The dissent also describes the five companies as "captive suppliers and customers . . . ." *Post*, at 342. This description is at odds with the undisputed facts. See *supra*, at 320–324.

Idaho's proposal is that corporate *purpose* should define unitary business. It argues that intangible income should be considered a part of a unitary business if the intangible property (the shares of stock) is "acquired, managed or disposed of for purposes relating or contributing to the taxpayer's business." Brief for Appellee 4. See also Tr. of Oral Arg. 25 (urging that income from intangible property be considered part of a unitary business when the intangibles "contribute to or relate to or are some way in furtherance of the taxpayer's own trade or business"). Idaho asserts that "[i]t is this integration—i. e., between the business use of the intangible asset (the shares of stock) and ASARCO's mining, smelting, and refining business—which makes the income part of the unitary business." Brief for Appellee 4.

This definition of unitary business would destroy the concept. The business of a corporation requires that it earn money to continue operations and to provide a return on its invested capital. Consequently *all* of its operations, including any investment made, in some sense can be said to be "for purposes related to or contributing to the [corporation's] business." When pressed to its logical limit, this conception of the "unitary business" limitation becomes no limitation at all. When less ambitious interpretations are employed, the result is simply arbitrary.[22]

---

[22] Cf. Keesling & Warren, California's Uniform Division of Income for Tax Purposes Act, Part I, 15 UCLA L. Rev. 156, 172 (1967).

Such arbitrariness is evident in this case. As previously noted, see n. 10, *supra*, ASARCO received dividend income from Lake Asbestos of Quebec. Lake Asbestos is a wholly owned subsidiary of ASARCO that is engaged in extracting and processing asbestos fibers in Canada. App. 86a. Its selling agent is ASARCO International, another wholly owned ASARCO subsidiary. *Ibid.* The Idaho Supreme Court found that "Lake Asbestos has its own staff, but ASARCO provides important management services. Lake Asbestos seeks ASARCO's direction and approval on major policy decisions." 99 Idaho, at 929, 592 P. 2d, at 44.

Lake Asbestos consequently appears in many respects to be more likely to qualify as part of ASARCO's unitary business than does any of the five

We cannot accept, consistently with recognized due process standards, a definition of "unitary business" that would permit nondomiciliary States to apportion and tax dividends "[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State . . . ."[23] *Mobil Oil Corp.* v. *Commissioner of Taxes of*

---

corporations involved in this case. Yet Idaho now agrees, as the courts below held, that on this record Lake Asbestos is *not* part of such a business. See Tr. of Oral Arg. 39.

ASARCO also received approximately $250,000 a year in dividends from Kennecott Copper Corp., and approximately $300,000 a year in dividends from Phelps Dodge. App. 52a. The record describes the business of these two corporations as the mining, smelting, refining, and sale of copper. *Id.*, at 50a. ASARCO made sales in the range of $3–$5 million a year to Kennecott, and $24,000–$800,000 a year to Phelps Dodge. *Id.*, at 27a. Each in turn made some (albeit "minimal") sales to ASARCO. *Id.*, at 43a–47a.

In light of this information, we have no basis for concluding that ASARCO did *not* "acquire" stock in Kennecott and Phelps Dodge "for purposes relating or contributing to the taxpayer's business." Brief for Appellee 4. ASARCO's management scarcely would make such an admission. Yet Idaho makes no claim that Kennecott and Phelps Dodge are part of ASARCO's unitary business.

JUSTICE O'CONNOR's dissent views the Court's decision as "prohibiting apportioned taxation of investment income by nondomiciliary states." *Post*, at 345 *et seq.* This reflects a serious misunderstanding of our decision today and the cases on which we rely. The case we follow primarily is *Mobil*. It sustained the taxation of investment income after applying enunciated principles carefully to the facts of the case. In this case we have applied the same principles but have reached a different result because the facts differ in critical respects. As we have said elsewhere, the application of the unitary-business principle requires in each case a careful examination both of the way in which the corporate enterprise is structured and operates, and of the relationship with the taxing State.

[23] The dissent, argues that our reliance on the Due Process Clause is inappropriate. It also says that our holding that Idaho has exceeded its jurisdiction to tax somehow "strip[s] Congress of the authority" to authorize or regulate state taxation. *Post*, at 331. See also *post*, at 349–350, 353. In analyzing the validity of Idaho's tax, we follow long-established precedent in relying on the Due Process Clause of the Fourteenth Amendment. See,

Vermont, 445 U. S., at 442. In such a situation, it is not true that "the state has given anything for which it can ask return." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S., at 444.

Justice Holmes stated long ago that "the possession of bonds secured by mortgages of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the [taxing State's] part of the [business] is no sufficient ground for the increase of the tax—whatever it may be . . . ." *Wallace* v. *Hines*, 253 U. S. 66, 69–70 (1920). In this case, it is plain that the five dividend-paying subsidiaries "add to the riches" of ASARCO. But it is also true that they are "discrete business enterprise[s]" that—in "any business or economic sense"—have "nothing to do with the activities" of ASARCO in Idaho. *Mobil, supra*, at 439–442. Therefore there is no "rational relationship between the [ASARCO dividend] income attributed to the State and the intrastate values of the enterprise. *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272–273 (1978)." *Mobil, supra*, at 437. Idaho's attempt to tax a portion of these dividends can be viewed as "a mere effort to reach profits earned elsewhere under the guise of legitimate taxation." *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271, 283 (1924). The Due Process Clause bars such an effort to levy upon income that is

---

e. g., *Exxon*, 447 U. S., at 219, 221–225, 226, 227; *Mobil*, 445 U. S., at 436–442; *Butler Bros.* v. *McColgan*, 315 U. S., at 507, 508; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S., at 120–121. In view of our decision on due process, it is unnecessary to address appellant's Commerce Clause argument. In any event, it is elementary that the "States . . . are subject to limitations on their taxation powers that do not apply to the Federal Government." *F. W. Woolworth Co.* v. *Taxation & Revenue Dept.*, *post*, at 363. Cf. *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 713 (1982) (POWELL, J., concurring in judgment). The question of federal authority to legislate in this area—whether to lay taxes or to delegate such power—is not presented in this case, and we imply no view as to it.

not properly "within the reach of [Idaho's] taxing power." *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S., at 80.[24]

IV

In addition to the disputed dividend income, Idaho also has sought to tax certain ASARCO interest and capital gains in-

---

[24] The dissenting opinion reflects profound—though unexpressed—dissatisfaction with the unitary-business principle, even though it was firmly established by more than a half a dozen decisions of this Court prior to *Mobil* and *Exxon*. See n. 14, *supra*. The dissent purports to rely on these recent cases, and yet its basic arguments—in practical effect—would seriously undermine their force as precedents. It relies primarily on considerations quite different from those identified as controlling in *Mobil* and *Exxon*. The dissent does not deny that ASARCO's subsidiaries were discrete business enterprises; rather it submits that they were engaged "in the same general line of business." *Post*, at 335. It notes—though the relevance is not obvious—that the management of ASARCO had special knowledge of the types of business engaged in by these subsidiaries. *Post*, at 336–337. The dissent also perceives a relationship between Idaho and the investment income simply because ASARCO has the use in its business of income from whatever source it may be derived. *Post*, at 337–339. Finally, it emphasizes the limited amount of open market buying and selling of products between ASARCO and the companies in which it has invested funds. See Parts III–A and III–B, *supra*.

In *Mobil*, in applying the unitary-business principle, the Court stated that the question is whether "the [investment] income was earned in the course of activities unrelated to the sale of petroleum products" in the State seeking to tax the income. Our decision went against Mobil Oil Corp. because we found that its "foreign activities [were] part of appellant's integrated petroleum enterprise," and because the subsidiaries in question were not shown to operate as "discrete business enterprise[s]." 445 U. S., at 439. In this case, in sharp contrast, the record establishes that each of the three partial subsidiaries in question operated a "discrete business enterprise" having "nothing to do with the activities of [ASARCO] in the taxing State." *Id.*, at 442.

As we recognize in this opinion, these cases are decided on their facts in light of established general principles. The most comprehensive discussion of the factors that are relevant is contained in our recent decisions in *Mobil* and *Exxon*. In both of those cases, that we follow today, the States come. The interest income arose from a note ASARCO received from its sale of Mexicana stock and from a Revere convertible debenture, as well as in connection with ASARCO's 1970 disposition of its General Cable stock. See n. 21, *supra*. The General Cable stock sale also generated capital gains for ASARCO, as did ASARCO's sale of a portion of its stock in M. I. M.

Idaho and ASARCO agree that interest and capital gains income derived from these companies should be treated in the same manner as the dividend income.[25] Brief for Appellant 27; Brief for Appellee 21. Cf. 99 Idaho, at 937, 592 P. 2d, at 52 ("In our view the same standard applies to the question whether gains from the sale of stock are business income as applies to the question whether dividends from the stock are business income"). We also agree. "One must look principally at the underlying activity, not at the form of investment, to determine the propriety of apportionability." *Mobil*, 445 U. S., at 440. Changing the form of the income "works no change in the underlying economic realities of [whether] a unitary business [exists], and accordingly it ought not to affect the apportionability of income the parent receives." *Id.*, at 441. We therefore hold that Idaho's attempt to tax this income also violated the Due Process Clause.

V

For the reasons stated, the judgment of the Supreme Court of Idaho is

Reversed.

---

prevailed because it was clear that the corporations operated unitary businesses with a continuous flow and interchange of common products. ASARCO has proved that these essential factors are wholly absent in this case. It is late in the day to confuse this important area of state tax law by rewriting the standards of *Mobil* and *Exxon*.

[25] ASARCO has not challenged Idaho's taxation of interest and capital gains income other than that attributable to the five corporations discussed in the text. Brief for Appellant 26. We do not intimate views on such matters.

CHIEF JUSTICE BURGER, concurring.*

I join the Court's opinions in both No. 80–2015 and No. 80–1745 in reliance on the Court's express statement that the Court's holdings do not preclude future congressional action in this area. *Ante*, at 328, n. 23.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

The Court today declares that the Due Process Clause of the Constitution forbids a State to tax a proportionate share of the investment income of a nondomiciliary corporation doing business within its borders. In so doing, the Court groundlessly strikes down the eminently reasonable assertion of Idaho's taxing power at issue in this case. Far more dismaying, however, is that the Court's reliance on the Due Process Clause may deprive Congress of the authority necessary to rationalize the joint taxation of interstate commerce by the 50 States.

Today, the taxpayer wins. Yet in the end, today's decision may prove to be a loss for all concerned—interstate businesses themselves, which the Commerce Clause guarantees the opportunity to serve the country's needs unimpeded by a parochial hodgepodge of overlapping and conflicting tax levies; the Nation, which demands a prosperous interstate market; and the States, which deserve fair return for the advantages they afford interstate enterprise. For while this Court has the authority to invalidate a specific state tax, only Congress has both the ability to canvass the myriad facts and factors relevant to interstate taxation and the power to shape a nationwide system that would guarantee the States fair revenues and offer interstate businesses freedom from strangulation by multiple paperwork and tax burdens. Unfortunately, by apparently stripping Congress of the authority to do the job, the Court delays the day when a uniform system responsive to the needs of all can be fashioned.

---

*[This opinion applies also to No. 80–1745, *F. W. Woolworth Co.* v. *Taxation and Revenue Department of New Mexico*, *post*, p. 354.]

The Court has strayed "beyond the extremely limited restrictions that the Constitution places" on the taxing power of the States, "inject[ed itself] in a merely negative way into the delicate processes of fiscal policy-making," and regrettably "imprison[ed] the taxing power of the states within formulas that are not compelled by the Constitution." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 445 (1940). I respectfully dissent.

I

"Taxes," as Justice Holmes once observed, "are what we pay for civilized society." *Compania General de Tabacos de Filipinas* v. *Collector of Internal Revenue*, 275 U. S. 87, 100 (1927) (dissenting opinion). A natural corollary of this proposition is that the Due Process Clause permits state taxation if "the state has given anything for which it can ask return." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S., at 444. A State thus "is free to pursue its own fiscal policies, unembarrassed by the Constitution," if it "exert[s] its power in relation to opportunities which it has given, to protection which it has afforded, [or] to benefits which it has conferred by the fact of being an orderly, civilized society." *Ibid.*

In applying this fundamental principle to businesses that derive income from more than one State, we repeatedly have declared that a state tax passes constitutional muster unless the taxpayer can show that there is not even "a 'minimal connection' between [its] interstate activities and the taxing State," or a merely "rational relationship between the income attributed to the State and the intrastate values of [its] enterprise." *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 436–437 (1980) (quoting *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272–273 (1978)). As the present case demonstrates, however, this oft-repeated formula is more easily stated than applied when a State attempts to tax the net income of an enterprise doing business in many jurisdictions.

The principal difficulty arises because a multijurisdictional business is "an organic system," *Wallace* v. *Hines*, 253 U. S.

66, 69 (1920) (Holmes, J.), whose income cannot sensibly be reduced to the sum of the hypothetical incomes of distinct component parts, each wrenched from the unitary whole and conceptually confined to operations within a single State.[1] With this understanding in mind, for more than half a century we have held that a State is not constitutionally required to tax only that slice of an interstate enterprise operating physically within the State. See, *e. g., Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n,* 266 U. S. 271 (1924); *Exxon Corp.* v. *Wisconsin Dept. of Revenue,* 447 U. S. 207 (1980). Instead, as we stated only two Terms ago, "[i]t has long been settled that 'the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs,'" *id.,* at 219 (quoting *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 460 (1959)), provided only that in each case the resulting tax liability is not "'out of all appropriate proportion to the business transacted'" in the taxing

---

[1] For example, if the expenses incurred by a vertically integrated business in manufacturing a product in State A are deducted from the revenues generated by marketing the product in State B, the resulting net income cannot reasonably be allocated either entirely to State A or entirely to State B. See *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 120–121 (1920). Even when state-by-state allocation superficially seems feasible, as in the case of a horizontally integrated, but loosely knit chain of retail stores, "economies of scale" resulting from "functional integration" and "centralization of management," *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* 445 U. S. 425, 438 (1980), may augment the net income earned by the whole to a value greater than the sum of what could be earned by each of the parts operating separately. See *Butler Bros.* v. *McColgan,* 315 U. S. 501, 508–509 (1942). When this happens, the additional increment in income resulting from the combination cannot be allocated to any single one of the parts on other than an arbitrary basis. See, *e. g., Adams Express Co.* v. *Ohio State Auditor,* 165 U. S. 194, 221 (1897) (a unitary enterprise has a "value resulting from the combination of the means by which the business [is] carried on [which] exist[s] . . . throughout the entire domain of [its] operation"). The net income of an organic, unitary business, in short, is indivisible.

State itself, 447 U. S., at 220 (quoting *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123, 135 (1931)).

In short, the "linchpin" of apportioned state taxation is the concept of an organic, unitary business. *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, supra*, at 439. The constitutionality of a state tax levied on extraterritorial business operations thus turns on whether the out-of-state business activity can be characterized as a separate business with no in-state contacts or whether instead it is a part of a unitary enterprise doing business in the State. In the case before us, the Court first errs when it attempts to determine whether or not ASARCO's investments were part of ASARCO's unitary nonferrous metals business.

II

ASARCO realized capital gains, dividends, and interest income from its ownership of securities issued by five foreign subsidiaries. The issue for the Court is whether that income was earned by ASARCO's unitary nonferrous metals business, and therefore was subject to Idaho's taxes, or instead was earned by a separate investment business unrelated to ASARCO's operations in Idaho, and therefore was constitutionally exempt from taxation by that State. As always, of course, the State's taxation of the company's income is presumptively constitutional. To overcome that presumption, ASARCO has the "'distinct burden of showing by "clear and cogent evidence"'" that Idaho's scheme "'results in extraterritorial values being taxed.'" *Exxon Corp.* v. *Wisconsin Dept. of Revenue, supra*, at 221 (quoting *Butler Bros.* v. *McColgan*, 315 U. S. 501, 507 (1942), in turn quoting *Norfolk & Western R. Co.* v. *North Carolina ex rel. Maxwell*, 297 U. S. 682, 688 (1936)).

According to the Court, ASARCO has met this burden by showing that during the relevant tax years its holdings in the five subsidiaries were passive investments not functionally integrated with ASARCO's nonferrous metals business. On this basis, the Court concludes that ASARCO's holdings were, in effect, part of a separate investment business having too little to do with ASARCO's unitary nonferrous metals business to support apportioned taxation.

Both common sense and business reality dictate a different result. ASARCO, far from showing that its investment holdings were part of an "unrelated,"[2] "discrete business enterprise,"[3] "hav[ing] nothing to do with the activities"[4] of its unitary nonferrous metals business, has failed in at least three ways to bear its "distinct burden" of demonstrating that Idaho's tax was unconstitutionally levied.

A

First, even accepting, *arguendo*, the Court's conclusion that the contested income was derived from passive investments, ASARCO has failed to show that its investment decisionmaking was segregated from its nonferrous metals business. ASARCO cannot deny that the subsidiary companies in which it invested were participants in the nonferrous metals industry, the very industry in which ASARCO played a major operational role. As the Court acknowledges, ASARCO "mine[d], smelt[ed], and refine[d] . . . nonferrous metals such as copper, gold, silver, lead, and zinc," *ante*, at 309, while one of its subsidiaries "engaged in the mining, milling, smelting, and refining of nonferrous metals," *ante*, at 309, n. 2, another engaged "in the same general line of business" as did "ASARCO in the United States," *ibid.*, a third "mine[d] and smelt[ed] copper," *ante*, at 309–310, n. 2, and the last two were important "ASARCO customers," *ante*, at 323, fabricating, respectively, cables and copper wares, *ante*, at 309, n. 2. In short, ASARCO invested not in "unrelated business[es]," such as hotel chains and breweries, but in companies participating in the nonferrous metals markets. *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S., at 224 (quoting *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S., at 442).

---

[2] *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, supra*, at 439.

[3] *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 224 (1980).

[4] *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, supra*, at 442.

ASARCO invested in these nonferrous metals companies with a well-founded confidence that few other investors could muster, since much of what it had learned in operating its own nonferrous metals business must have been invaluable in evaluating the prospects for other companies engaged in similar businesses and markets worldwide. Put another way, it would have been a perverse act of self-denial for ASARCO to ignore its intimate knowledge of world markets, refining and smelting technology, mining operations, and geological reserves when it decided whether and how to invest in the five companies of concern here. Thus, the investment decisions ASARCO made regarding the securities of these five participants in the nonferrous metals markets undoubtedly depended heavily on ASARCO's knowledge of its own business.

In fact, during the course of this litigation, ASARCO has admitted as much. In the trial court, ASARCO's vice president and comptroller answered questions put to him by ASARCO's counsel as follows:

> "Q. Now, ASARCO has investments in a lot of mining companies, does it not?
>
> "A. Yes.
>
> "Q. Can you tell the court why ASARCO makes investments of this nature?
>
> "A. The ASARCO management utilizes its expertizes *[sic]* in channeling funds into these areas where they are knowledgeable and—most knowledgeable—and hopefully accrue *[sic]* to the benefit of ASARCO stockholders.
>
> "Q. So that essentially ASARCO feels that it can use its expertizes *[sic]* to produce the maximum returns for its shareholders?
>
> "A. That is correct.

> "Q. And whereas with other purchases I suppose ASARCO feels that the shareholders can make the investments themselves as well as ASARCO can?
>
> "A. Right." Record 81–82.

Moreover, in its brief to the Supreme Court of Idaho ASARCO flatly stated that "[i]t invests its shareholders' money in businesses in which it has expertise and distributes the investment return in the form of dividends to its shareholders." *Id.*, at 521.

In sum, far from showing by "clear and cogent evidence" that its investment decisions regarding other nonferrous metal suppliers and users were segregated from the resources of information and expertise developed in its own nonferrous metals business, ASARCO itself provided evidence that its investment decisionmaking was part of an indivisible, unitary nonferrous metals business. This alone warrants affirming the Idaho Supreme Court's due process ruling.

B

Second, again assuming, *arguendo*, that the contested investments were in fact passive, ASARCO has failed to show that its holdings were divorced from its management of the financial requirements of its nonferrous metals business. For all we know, ASARCO's investments were triggered by its need to obtain a return on idle financial resources accumulated for the future operation of its own primary business.

ASARCO does not, and could not, contend that all its investment income is *per se* beyond the taxing power of the nondomiciliary States in which it operates. Rather, it concedes that the Due Process Clause permits Idaho to tax, on an apportioned basis, the income ASARCO earned on short-term investments of its working capital.[5] After all, an appropriate amount of liquid working capital is necessary to the day-to-day operation of a business, and any return earned from its temporary investment is a byproduct of the operation of the business. ASARCO thus admits that Idaho could tax a portion of the income realized from an investment in, say, short-term commercial paper, even though the underlying operations of the issuing companies were far less related to ASARCO's nonferrous metals business than the operations of the five subsidiaries at issue here.

---

[5] ASARCO states that it "has not contested Idaho's right to treat interest income from temporary deposits of [its] working capital funds as

The interim investment of retained earnings prior to their commitment to a major corporate project, however, merely recapitulates on a grander scale the short-term investment of working capital prior to its commitment to the daily financial needs of the company. Just as companies prefer to maintain a cushion of working capital rather than resort to the short-term capital markets on an hourly basis for the money necessary to operate their businesses, many enterprises prefer to acquire the capital necessary for the expansion and replacement of plants and equipment by creating long-term funds, rather than resort to the vagaries of the capital markets. In order to prevent the accumulating capital from sitting idle, such funds are usually invested in financial assets with a degree of liquidity appropriate to the money's intended ultimate use.[6] Any return ASARCO earned on such investments

---

apportionable business income derived in the ordinary course of [its] Unitary Business activities." Brief for Appellant 26. See also Tr. of Oral Arg. 6–7.

[6] This process is analogous to the leasing of idle physical assets until they are needed in the business. By analogy to ASARCO's investment of its working capital in short-term securities, for example, a company might lease time on one of its computers to outsiders on an hourly basis in order to keep the computer fully occupied during slack periods. Similarly, in analogy to the interim investment of retained earnings, a company might lease for a term of years the areas of its office buildings into which it intends ultimately to expand. It could hardly be claimed that by so doing the company had opened up a separate and unrelated leasing business. To

plainly would be functionally related to the conduct of its nonferrous metals business and, therefore, taxable by Idaho on an apportioned basis as unitary business income.

Such investment of idle funds, after all, mirrors the borrowing of funds a company lacks. Undoubtedly, ASARCO would be quick to assert that any long-term borrowing recorded on the liability side of its balance sheet is an integral part of its unitary business justifying the deduction of interest expense in the computation of apportionable net income. If so, ASARCO cannot contend that the long-term investments recorded on the asset side of its balance sheet are automatically separate from its unitary business, thereby justifying the exclusion of the revenues received from apportionable net income. The same principles apply whether the money is going in or coming out.

Thus, because investments of ASARCO's working capital are functionally integrated with its unitary nonferrous metals business, and because ASARCO failed to show by "clear and cogent evidence" the facts necessary to distinguish, on a principled basis, its investments in the securities of the five subsidiaries at issue here,[7] the Idaho Supreme Court correctly concluded that apportioned taxation of ASARCO's contested investment income does not violate the Due Process Clause.

---

the contrary, the income from such leases would be functionally related to the company's unitary business and, therefore, taxable on an apportioned basis by a State in which the company did business. Accordingly, it is hard to see why a company that rents out idle money rather than idle physical assets should be treated differently under the Due Process Clause, and harder still to see why the Constitution would treat short-term investments of working capital differently than longer-term investments of retained earnings.

[7] Of course, had ASARCO attempted to do so, it might have been able to make such a showing. ASARCO did argue, and the trial court found, that it had "never been required to utilize its stock as security for borrowing of working capital, acquiring stock or securities in other companies or to support any bond issues." Record 326.

C

Finally, the Court errs even in its fundamental determination that ASARCO's holdings were passive investments unrelated to ASARCO's operational business. In fact, the disputed investments actively contributed to ASARCO's nonferrous metals business.

To begin with, ASARCO had effective operational control of at least three of the five subsidiaries. ASARCO's commanding 52.7% interest in M. I. M. Holdings, Ltd., uncontestably gave it full control of that company. Although ASARCO did not wield quite the same power over Southern Peru Copper, its 51.5% interest nonetheless gave it unilateral veto power over all corporate decisions, including those supported unanimously by all other shareholders.[8] Finally, in the case of ASARCO Mexicana, the record discloses only that ASARCO had been forced to sell 51% of its initial 100% interest to Mexican nationals, retaining a 49% interest for itself. ASARCO has made no showing that it is not the principal investor in Mexicana and thus able to control the company. In sum, ASARCO undoubtedly was the dominant factor in at least three of the five subsidiaries under consideration here, with the power to use them to advantage in its nonferrous metals business.[9] The Court, however, minimizes the sig-

---

[8] Under the management agreement between ASARCO and the other three shareholders of Southern Peru, ASARCO has the right to appoint 6 of the company's 13 directors, the other three shareholders together have the right to appoint another 6, and the 13th and final director is appointed by the first 12 directors or by joint action of all the shareholders. Southern Peru's bylaws, which can be changed only by unanimous consent, provide that eight votes are needed to pass any resolution. App. to Juris. Statement 55a; App. 121a.

[9] ASARCO also dominated Revere Copper and General Cable. While ASARCO owned only 34% interests in each company, the remaining shares of each were "widely held," *ante*, at 324, so that ordinarily ASARCO would be assured control of each company and almost never face effective opposition to its wishes.

Prior to the tax years in question, however, the Justice Department brought an antitrust suit against ASARCO related to its holdings in Gennificance of this control, emphasizing that ASARCO did not openly and aggressively assert its control during the tax years in question and concluding that ASARCO's subsidiaries did not contribute to its nonferrous metals business.

The Court's result is hard to understand in view of our decision just two years ago in *Exxon Corp.* v. *Wisconsin Dept. of Revenue.* In summarizing our result in *Exxon*, we asserted that the "important link" establishing the unity of

---

eral Cable and Revere Copper. The suit culminated in a consent decree issued in 1967 forbidding ASARCO to sell to General Cable and Revere Copper at prices lower than ASARCO sold to other customers and preventing ASARCO from voting its stock in either company. In 1970, the last of the three tax years at issue here, the decree was modified and "ASARCO was compelled . . . to divest itself of all its General Cable stock." *Ante*, at 324, n. 20.

ASARCO argues that the 1967 consent decree, which was issued before the tax years of concern here, prevented General Cable and Revere Copper from being a part of ASARCO's unitary business. To the contrary, however, the antitrust suit and consent decree strongly suggest that General Cable and Revere Copper were entangled in ASARCO's unitary business, perhaps unlawfully so. On the present record, ASARCO has not borne the burden of showing that the 1967 decree severed enough of the connections between ASARCO and the two subsidiaries to transform ASARCO's holdings from active components of its unitary business to passive investments. At least with respect to General Cable, the modification in 1970 (the last tax year in issue here) of the consent decree so that ASARCO was required to sell its holdings in the company indicates the contrary, since divestiture would scarcely be necessary if the business of the two companies had been unrelated. Moreover, the mere fact that ASARCO traded with General Cable and Revere Copper at market rates does not compel the conclusion that ASARCO's investments in those companies were part of its unitary business. In *Exxon*, for example, we concluded that the fact that "wholesale market values" were assigned "to interdepartmental transfers of products and supplies," 447 U. S., at 225, did not undermine the unitary nature of Exxon's business.

Although I believe that ASARCO's showing was insufficient to establish that General Cable and Revere Copper were not under its control for purposes of determining the constitutional limits of Idaho's taxation, for simplicity in what follows I assume only that ASARCO was a major investor in these two subsidiaries.

Exxon's business "most clearly" was based on two factors. 447 U. S., at 224.

First, we noted that "'placing individual segments under one corporate entity . . . provide[s] greater profits stability'" because "'nonparallel and nonmutual economic factors which may affect one department may be offset by the factors existing in another department.'" *Id.*, at 225 (quoting the testimony of an Exxon senior vice president). ASARCO's ownership of subsidiaries doing business in precisely ASARCO's line of work in two different geographical markets, M. I. M. Holdings in Australia and ASARCO Mexicana in Mexico, undoubtedly provided exactly that sort of advantage; economic conditions in Australia and Mexico do not track those in the United States, so that when the nonferrous metals business is in the doldrums in one country, it may be prospering in another. But, unlike the *Exxon* Court, today's Court is blind to the significance to the "profits stability" of ASARCO's nonferrous metals business of its subsidiaries in unrelated geographical markets.

Second, in *Exxon* we noted that the vertical relationship between the various departments in Exxon's business provided both "an assured supply of raw materials" and an "assured and stable outlet for products" so that Exxon could "minimiz[e]" the "risk of disruptions" "due to [the] supply and demand imbalances that may occur from time to time." *Ibid.* The *Exxon* Court's recognition of the business importance of captive suppliers and customers merely confirmed our earlier decision in *Mobil Oil*, in which we affirmed Vermont's apportioned taxation of the more than $115 million in dividend income Mobil had received from its 10% interest in the Arabian American Oil Co. 445 U. S., at 457, n. 10 (STEVENS, J., dissenting). Mobil's 10% investment, apart from providing handsome dividends, apparently had helped to assure Mobil of supplies of crude oil for its petroleum business. By contrast, the Court today inexplicably invalidates Idaho's taxation of ASARCO's dividend income from its fivefold greater 51.5% interest in Southern Peru Copper Corp., an investment that evidently helped to assure ASARCO of supplies of unrefined copper, since 35% of the entire copper output of Southern Peru was sold to ASARCO.[10]

Apparently, the Court no longer believes it significant that the subsidiaries in which a parent has major holdings "minimiz[e]" the "risk of disruptions" "due to [the] supply and demand imbalances that may occur from time to time," *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S., at 225, by providing "assured suppl[ies]" and "stable outlet[s]," *ibid.*, unless the subsidiaries are actively managed on a day-to-day basis. The Court evidently would find that ASARCO's subsidiaries were part of ASARCO's unitary business only if ASARCO experienced a "supply and demand imbalanc[e]" sufficiently severe to force it to exercise day-to-day control of its captive subsidiaries. In this regard, the Court's position is akin to the view that a paid-up fire insurance policy is a worthless asset unless smoke is in the air.

In sum, despite ASARCO's failure on each of the three counts just discussed to bear its "distinct burden" of showing that its investments are unrelated to its nonferrous metals business, the Court rules that Idaho cannot tax the investment income at issue here. In so doing, the Court unwisely substitutes for the multifaceted analysis used to determine whether the businesses in *Mobil Oil* and *Exxon* were unitary the oversimplified test of active operational control. The result is that the Court has ignored business advantages to ASARCO more than sufficient to establish that its holdings in its subsidiaries were part of its unitary business. In consequence, the Court wrongly concludes that ASARCO has borne the "distinct burden" of showing that its holdings in the five affected subsidiaries are not functionally related to the income of its operational nonferrous metals business.[11]

---

[10] Just as inexplicably, the Court reverses Idaho's apportioned tax on ASARCO's dividend income from its 34% interests in Revere Copper & Brass and in General Cable Corp., companies that were "major customers" of ASARCO buying tens of millions of dollars of goods from ASARCO each year.

Trying to justify that result, the Court suggests that for it to hold otherwise "would destroy the concept" of a unitary business by expanding the idea until it "becomes no limitation at all" on the power of the States to tax. *Ante*, at 326. In actuality, the Court's decision today shrinks the concept beyond all recognition. Thus it is the Court's holding, not Idaho's tax, that menaces the unitary-business principle. The "linchpin" is loose from the axle.

III

As a natural consequence of its decision that Idaho cannot tax ASARCO's investment income, the Court simultaneously, if implicitly, rules out taxation of the disputed income by any other nondomiciliary State in which ASARCO conducts its nonferrous metals business, absent a special connection between the would-be taxing State and ASARCO's investments.[12] By the process of elimination, then, the Court's holding provides a partial answer to the question of which State or States the Constitution permits to tax this income. The answer the Court gives, however, demonstrates how ill-advised is the course on which it embarks. By its analysis, the Court leaves open three possible choices regarding which States, if any, may tax ASARCO's contested income. Each of these possibilities suffers from crippling defects, pointing to the conclusion that the Court errs in prohibiting apportioned taxation of investment income by nondomiciliary States.

---

[11] The Court suggests that my "perception of some of the facts" necessary to reach this conclusion "differs substantially from the record." *Ante*, at 325, n. 21. In fact, however, my view of the facts differs from neither the record nor, I think, that of the Court. As should be apparent, my disagreement with the Court is based, not on the facts, but on the constitutional significance to be given those facts.

[12] The Court is careful not to extend the reach of its holding to domiciliary States. It states the question presented as "whether the State of Idaho constitutionally may include within the taxable income of a *non*domiciliary parent corporation . . . a portion of intangible income . . . that the parent receives from subsidiary corporations having no other connection with the State." *Ante*, at 308–309 (emphasis added). As its holding, the Court asserts that it "cannot accept . . . a definition of 'unitary business' that would permit *non*domiciliary States to apportion and tax dividends '[w]here the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State . . . .'" *Ante*, at 327 (citation omitted, emphasis added).

A

First, there is the disturbing possibility that no State could satisfy the requirements of the Due Process Clause as interpreted today by the Court, so that the contested income would be, in the words of state tax administrators, "nowhere income."[13] If so, today's holding casts a deep shadow on the ability of the States to tax their fair share of the corporate income they help to produce by providing an "orderly, civilized society." Even more disturbing, given such an interpretation, the Court's decision endangers even federal taxation of passive investment income, since the Federal Government's contacts with the income at issue here obviously cannot exceed the sum of the contacts of the various States. Presumably, the Court's opinion should not be read as erecting so high a hurdle to state and federal taxation.

B

Second, there is the possibility that only a domiciliary State or States could tax the disputed income. In *Mobil Oil*, the Court stated that "[t]axation by apportionment *and* taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained."

---

[13] See Dexter, Taxation of Income from Intangibles of Multistate-Multinational Corporations, 29 Vand. L. Rev. 401, 403 (1976).

445 U. S., at 444–445 (emphasis added). If so, the converse may also be true: if taxation by apportionment is constitutionally condemned, taxation by allocation to a single situs may be constitutionally preferred. The Court's decision today thus could be read as broadly hinting that a domiciliary State enjoys a preference of constitutional dimension justifying its—and only its—taxation of income such as that derived from ASARCO's investments.

Perhaps such a preference could find some blessing in tradition, but certainly not in logic or in the recent opinions of this Court. In *Mobil Oil* itself, the Court declared:

> "We find no adequate justification . . . for such a preference. Although a fictionalized situs for intangible property sometimes has been invoked to avoid multiple taxation of ownership, there is nothing talismanic about the concepts of 'business situs' or 'commercial domicile' that automatically renders those concepts applicable when taxation of income from intangibles is at issue. The Court has observed that the maxim *mobilia sequuntur personam*, upon which these fictions of situs are based, 'states a rule without disclosing the reasons for it.' The Court also has recognized that 'the reason for a single place of taxation no longer obtains' when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction. . . . Moreover, cases upholding allocation to a single situs for property tax purposes have distinguished income tax situations where the apportionment principle prevails." *Id.*, at 445 (citations omitted).

The Court thus made clear only two years ago that a State of domicile cannot expect automatically to meet the due process requirements for the taxation of investment income. As with a nondomiciliary State, a domiciliary State may tax investment income only if it confers benefits on or affords protection to the investment activity. Mere assertion of the arbitrary legal fiction that intangible property is located at its owner's domicile no longer suffices to repel a reluctant taxpayer's due process attack.

The principal functional basis on which this Court has justified taxation by the commercial domicile, moreover, actually supports the fully apportioned taxation of investment income that today's decision rules out, rather than taxation by allocation to a single situs. In *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193 (1936), for example, we sustained an ad valorem tax on accounts receivable and bank deposits levied by the State in which the taxpayer maintained "the actual seat of its corporate government," *id.*, at 212, for the reason that the intangibles at issue had become "'integral parts of some local business,'" *id.*, at 210 (quoting *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 213 (1930)). Thus, other than the arbitrary fiction that intangible property is "located" at the domicile of its owner, the underlying jurisdictional basis for taxation at the commercial domicile is grounded in the fact that intangibles are an "integral part" of the business. This justification supports the principle of apportionment rather than allocation solely to the single domiciliary State. After all, if intangibles are an "integral part" of the unitary business in the domiciliary State, they also are related to the business of the corporation elsewhere. It hardly makes sense to allocate income to the commercial domicile on the theory that business activity at the commercial domicile promotes the unitary business everywhere, and then to ignore those connections and to disregard the claims of the other States in which the unitary business operates. See Dexter, Taxation of Income from Intangibles of Multistate-Multinational Corporations, 29 Vand. L. Rev. 401, 416 (1976).

In short, unless the Court is prepared to abandon the unitary-business principle as applied to investment income and to read into the Constitution the arbitrary legal fiction that intangibles are situated at the domicile of their owner, the

Court will be unable to sustain a domiciliary State's allocation of all passive investment income to itself against due process attack.

C

We thus arrive at the only remaining possibility. The Court's holding today, taken with past decisions, may imply that ASARCO's investments must be treated as though ASARCO were not only running its nonferrous metals business but also running as another, separate business a sort of mutual fund or holding company specializing in the worldwide nonferrous metals industry. The income from this fictitious separate business would then be taxable on an apportioned basis by those States in which the business was carried out, just as ASARCO's unitary nonferrous metals business could be taxed on an apportioned basis by those States in which that business is conducted.

If so, the Constitution apparently requires that a very small tail be permitted to wag a very big dog. For in the case of companies like ASARCO with tens or hundreds of millions of dollars of dividend income generated by a handful of long-term investments, vast differences in state revenues may turn on whether the quarterly dividend checks sent from "passive" subsidiaries are sent to a clerk in a company office in one State rather than another. Surely it is highly anomalous that the Due Process Clause should require the dividend income of a farflung interstate business selectively to be attributed solely to the State or two in which a few minimal securities management functions are carried out, rather than apportioned among all the States whose "civilized society" has made the income-generating wealth of the larger enterprise possible.

Moreover, if such a requirement were judicially imposed it would create potentially staggering practical difficulties for taxpayers, state tax administrators, and, ultimately, the courts. For despite the Court's easy conclusion today that ASARCO's supposedly discrete investment business is distinct from ASARCO's operational nonferrous metals business, it is unlikely in practice that the two could be so readily disentangled. Imagine, for example, that the dividend checks were received and the management decisions regarding ASARCO's investments were made at ASARCO's corporate headquarters in one State, while the expertise and information relied on to make those decisions were drawn from corporate sources in many States. In apportioning the income of this purportedly separate investment business among the States, the question inescapably would arise as to what limits the Constitution places on how little of the taxable values at ASARCO's headquarters the expertise- and information-producing States could allocate to ASARCO's investment business as opposed to the theoretically distinct operational nonferrous metals business. Stating the question suffices to show that it reintroduces just the sort of insoluble problem of dividing businesses that the unitary-business principle was designed to avoid. Thus, if the Court does not abandon the separate-business theory that it endorses today, it merely will have substituted the vexing constitutional problem of how to apportion businesses for today's problem of how to apportion taxes.

In sum, the Court has erred. Without a well-founded constitutional mandate, it has straitjacketed the States' ability to develop fair systems of apportionment, prematurely ending the evolutionary process begun by the Uniform Division of Income for Tax Purposes Act and the Multistate Tax Commission. By limiting the apportionment concept by restrictions not found anywhere in the Constitution, moreover, the Court has committed itself to a path leading to more constitutional problems and greater involvement by this Court in the intricacies of interstate taxation.

IV

The Court's error, moreover, is compounded by its decision to invoke the Due Process Clause as the source of its authority, despite the ready availability of the Commerce Clause.[14] For unlike a Commerce Clause ruling which is susceptible to repair by Congress, today's due process decision may be beyond Congress' power to correct.

This constitutional shortsightedness overlooks the fact that Congress, not this Court, holds the ultimate responsibility for maintaining a healthy system of interstate commerce. Moreover, it is Congress, not this Court, which has the institutional tools to deal with these complex problems. Congress itself is only too aware of the limitations under which the judiciary operates when it attempts to deal with the knotty problems of state taxation of multistate enterprises within a federal system. As the Special Subcommittee on State Taxation of the Committee on the Judiciary of the House of Representatives bluntly put it:

---

[14] This Court's authority to invalidate state legislation because it interferes with interstate commerce is inferred from the Constitution's grant to *Congress* of the authority to regulate interstate commerce. Art. I, § 8, cl. 3. For this reason, Congress may "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 44 (1980) (citations omitted). Consistent with this principle, it has long been established that Congress generally has the power to "overrule" a decision of this Court invalidating state legislation on Commerce Clause grounds. Compare *Leisy* v. *Hardin*, 135 U. S. 100 (1890), with *In re Rahrer*, 140 U. S. 545 (1891). By contrast, Congress generally cannot waive a ruling of this Court decided under the Due Process Clause. Accordingly, this Court's "threshold" for invalidating state legislation should be considerably higher under the Due Process Clause than under the Commerce Clause.

In the present case, the Court could have reached its result by relying on the Commerce Clause. Our cases establish that analysis of the validity of state taxation under the Commerce Clause is similar to analysis under the Due Process Clause. The test under the Commerce Clause is whether the tax "'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.'" *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S., at 443 (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977)). In his dissent in *Mobil Oil*, JUSTICE STEVENS explained how a violation of the Due Process Clause could also be a violation of the Commerce Clause: "[I]f, in a particular case, use of an allocation formula has the effect of taxing income earned by an interstate entity outside the State, it could alternatively be said to have the effect of taxing the income earned by that entity inside the State at a rate higher than that used for a comparable, wholly intrastate business, a discrimination that violates the Commerce Clause." 445 U. S., at 452, n. 4.

> "[T]he courts have over the years attempted to resolve the numerous and complex problems [of state taxation of interstate commerce] brought before them. . . . [T]heir decisions on State taxation leave much to be desired both in individual cases and as a body of law. The reason for this inadequacy is completely unrelated to the ability or diligence of a particular court or of any particular judge. The inadequacy is entirely institutional.
>
> "The problem arises from the fact that a court deals in absolutes, and in this area an absolute decision in either direction is not likely to be satisfactory. . . . [T]he court is substantially handicapped by its inability to explore fully the nature, the extent, and the impact of the burdens created [by state taxes].
>
> "The inherent inadequacy of the judicial process to achieve a full accommodation of the competing demands of the States for taxes and of the national interest in unhindered commerce, is perhaps nowhere more clear than in the apportionment of income for tax purposes. . . . In the typical case of this kind, the tax of only one of the States would be before the court . . . . The court has only the records of the cases before it with only such information as may be necessary to state the facts and consequences in those cases. On this basis, is the court in a position to choose between [competing approaches], striking down all formulas containing one or the other? If so, what standard should it use in deciding which one? Given the adversary system of litigation, how does the court obtain the necessary data on economic burdens and revenue consequences? . . .

> "Difficulties also arise from the limitations of the judicial process in prescribing what constitutes adequate jurisdiction to tax. As a question of due process the court can do no more than decide on conceptual grounds . . . whether the quality of the relationship in the case before it is sufficient to sustain the imposition of the tax. . . .
>
> ". . . It is no better suited to devise and prescribe general rules setting the optimum level of jurisdiction than it is to impose a uniform apportionment formula. For example, the judicial process does not lend itself to a determination of what level of nexus would strike the most equitable balance between the demands of the States for revenue and the probable burdens of compliance." H. R. Rep. No. 1480, 88th Cong., 2d Sess., 11–12 (1964).

Nor is Congress alone in recognizing the limitations of the judiciary in this field. Many Justices of this Court have acknowledged "the weakness of the judicial process in these tax questions where the total problem . . . reaches us only in installments." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 307 (1944) (Jackson, J., concurring). The Court itself has said: "To introduce a new doctrine of tax apportionment . . . is not merely to indulge in constitutional innovation. It is to introduce practical dislocation into the established taxing systems of the States. . . . [C]ertainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship." *Id.*, at 299–300 (opinion of the Court). Surely in a case such as the one before us, Congress, unconfined by "the narrow scope of judicial proceedings," *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, 592 (1852) (Taney, C. J., dissenting), is in a better position "in the exercise of its plenary constitutional control over interstate commerce, not only [to] consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but . . .

also on the basis of full exploration of the many aspects of a complicated problem [to] devise a national policy fair alike to the States and our Union." *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 189 (1940) (Black, J., dissenting). But it is just this sort of congressional action which today's due process decision appears to preclude. This Court should not so confidently pre-empt the Congress.

V

In sum, the Court has focused its attention solely on the question whether ASARCO's interests in its subsidiaries represented active investments and concludes they did not. The Court then permits this initial erroneous result to derail its analysis. Instead of continuing, the Court fails to consider the possibility that ASARCO's investment decisionmaking was not segregated from its operational nonferrous metals business; fails to consider the possibility that ASARCO's investments were simply an interim use of long-term funds accumulated for ultimate use elsewhere in the business; fails to consider the possibility that ruling out apportioned taxation of income earned from intangibles may imply that such income is "nowhere income"; fails to consider the possibility that its ruling may be inconsistent with the unitary-business principle because it suggests that income from intangibles may be taxed only by a domiciliary State; and fails to consider the possibility that it may be as difficult to apportion a business as to apportion income for constitutional purposes. Finally, and most distressingly, the Court fails to consider its own limitations and Congress' constitutional prerogatives. Had the Court given the intricate questions presented by this case the attention they deserve, it might have reached a different result. I respectfully dissent.

F. W. WOOLWORTH CO. *v.* TAXATION AND REVENUE DEPARTMENT OF NEW MEXICO

APPEAL FROM THE SUPREME COURT OF NEW MEXICO

No. 80–1745. Argued April 19, 1982—Decided June 29, 1982

Appellant's principal place of business and commercial domicile are in New York, but it engages in chainstore retailing throughout the United States. Under its income tax laws, New Mexico distinguishes between "business" income, which it apportions between it and other States, and "nonbusiness" income, which it generally allocates to a single State on the basis of commercial domicile. Appellant reported its dividend income from four of its foreign subsidiaries, which engage in chainstore retailing in foreign countries, as "nonbusiness" income, none of which was to be allocated to New Mexico. Similarly, appellant did not report as New Mexico "business" income a sum, commonly known as "gross-up," that it never actually received from its foreign subsidiaries but that the Federal Government (for purposes of calculating appellant's federal foreign tax credit) *deemed* it to have received. On audit, appellee determined that appellant should have included in its apportionable New Mexico income both the dividends and the gross-up figure. Appellant's protest was denied, but appellee's decision was reversed by the New Mexico Court of Appeals. However, the New Mexico Supreme Court in turn reversed, holding that both the dividends and the gross-up figure were apportionable New Mexico income.

Held:

1. New Mexico's tax on a portion of the dividends received by appellant from its foreign subsidiaries fails to meet established due process standards. Pp. 362–372.

(a) The linchpin of apportionability for state income taxation of an interstate enterprise is the "unitary-business principle." Appellant—as owner of all of the stock of three of its subsidiaries and a majority interest in the fourth—potentially has the authority to operate these companies as integrated divisions of a single unitary business. But the *potential* to operate a company as part of a unitary business is not dispositive when, as here, the dividend income from the subsidiaries in fact is derived from unrelated business activity of the subsidiaries, each of which operates a discrete business enterprise. *ASARCO Inc.* v. *Idaho State Tax Comm'n*, *ante*, p. 307; *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425. P. 362.

(b) For due process purposes, the income attributed to a State must be rationally related to values connected with the taxing State. This limitation is not satisfied merely because the nondomiciliary parent corporation derives some economic benefit from its ownership of stock in another corporation. Pp. 363–364.

(c) None of the factors relevant to a State's right to tax dividends from foreign subsidiaries exists in this case. The record shows that appellant's and its subsidiaries' operations—such as store site selection, advertising, accounting, purchasing, warehousing, and personnel training—were not functionally integrated. And except for the type of occasional oversight—with respect to capital structure, major debt, and dividends—that any parent gives to an investment in a subsidiary, there was little or no integration of business activities or centralization of management. Thus, the subsidiaries were not a part of a "unitary business." *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, distinguished. Pp. 364–372.

2. New Mexico's efforts to tax the "gross-up" income also contravenes the Due Process Clause. The "fictitious" gross-up figure is treated for federal foreign tax credit purposes as a dividend in the same manner as a dividend actually received by the domestic corporation from a foreign corporation. In this case the foreign tax credit arose from the taxation by foreign nations of appellant's foreign subsidiaries that had no unitary business relationship with New Mexico. Pp. 372–373.

95 N. M. 519, 624 P. 2d 28, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *ante*, p. 331. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 373.

William L. Goldman argued the cause for appellant. With him on the briefs were *George W. Beatty*, *James A. Riedy*, *Michael D. Bray*, and *Arnold S. Anderson*.

Sara E. Bennett, Special Assistant Attorney General of New Mexico, argued the cause for appellee. With her on the brief were *Denise D. Fort*, Assistant Attorney General, and *Filmore E. Rose*.*

---

*Briefs of *amici curiae* urging affirmance were filed for the State of Illinois by *Tyrone Fahner*, Attorney General, *Fred H. Montgomery*, Special Assistant Attorney General, and *Lloyd B. Foster;* and for the Multistate Tax Commission et al. by *William D. Dexter; Wilson L. Condon*, Attorney General of Alaska; *J. D. MacFarlane*, Attorney General of Colorado; *Carl R. Ajello*, Attorney General of Connecticut; *Richard S. Gebelein*, Attorney

JUSTICE POWELL delivered the opinion of the Court.

The question is whether the Due Process Clause permits New Mexico to tax a portion of dividends that appellant F. W. Woolworth Co. received from foreign subsidiaries that do no business in New Mexico. We also must decide whether New Mexico may include within Woolworth's apportionable New Mexico income a sum, commonly known as "gross-up," that Woolworth calculated in order to claim a foreign tax credit on its federal income tax.

I

Woolworth's principal place of business and commercial domicile are in New York. It engages in retail business through chains of stores located in the United States, Puerto Rico, and the Virgin Islands. It sells a wide spectrum of merchandise, including dry goods, hardware, small appliances, confections, packaged goods, and fountain items. In the fiscal year ending January 31, 1977, Woolworth's gross domestic sales totalled approximately $2.5 billion, with New Mexico sales amounting to approximately $13 million—or about 0.5% of the gross figure. App. 57a.

Woolworth owns four foreign subsidiaries of relevance to this suit. Three are wholly owned: F. W. Woolworth GmbH,

---

General of Delaware; *David H. Leroy*, Attorney General of Idaho, and *Theodore V. Spangler, Jr.*, Deputy Attorney General; *Linley E. Pearson*, Attorney General of Indiana; *Robert T. Stephan*, Attorney General of Kansas; *Stephen H. Sachs*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *Frank K. Kelley*, Attorney General of Michigan; *Warren R. Spannaus*, Attorney General of Minnesota; *John Ashcroft*, Attorney General of Missouri; *Paul L. Douglas*, Attorney General of Nebraska; *Gregory H. Smith*, Attorney General of New Hampshire; *Rufus L. Edmisten*, Attorney General of North Carolina, and *M. C. Banks*, Deputy Attorney General; *Robert O. Welfald*, Attorney General of North Dakota, and *Albert R. Hausauer*, Assistant Attorney General; *Dave Frohnmayer*, Attorney General of Oregon; and *David L. Wilkinson*, Attorney General of Utah.

John J. Easton, Attorney General of Vermont, and *Paul P. Hanlon* filed a brief for the State of Vermont as *amicus curiae*.

in Germany; F. W. Woolworth, Ltd., in Canada; and F. W. Woolworth, S. A. de C. V. Mexico. F. W. Woolworth Co., Ltd., is an English corporation of which Woolworth owns 52.7%, with the remainder held and traded publicly. These four corporations also engage in chainstore retailing.[1] Together they paid Woolworth approximately $39.9 million in dividends during the fiscal year in question.

New Mexico adopted a version of the Uniform Division of Income for Tax Purposes Act in 1965, N. M. Stat. Ann. §§ 7-4-1—7-4-21 (1981), and joined the Multistate Tax Compact in 1967. §§ 7-5-1—7-5-7 (1981). See *ASARCO Inc.* v. *Idaho State Tax Comm'n, ante,* at 311-312; *United States Steel Corp.* v. *Multistate Tax Comm'n,* 434 U. S. 452 (1978). Consequently the State distinguishes between "business" income,[2] which it apportions between it and other States for tax purposes,[3] and "nonbusiness" income,[4] which it generally allocates to a single State on the basis of commercial domicile.[5] Woolworth reported its dividend income of $39.9 million from its German, Canadian, Mexican, and English subsidiaries as "nonbusiness" income, none of which was to be allocated to New Mexico. Woolworth also treated as "nonbusiness" income a $1.6 million gain from a hedging transaction in British pounds. This transaction was undertaken for the purpose of insuring the payment of the British subsidiary's dividend against currency fluctuations. See App. 52a–54a. Similarly, Woolworth did not report as New Mexico "business" income $25.5 million of "gross-up" that it never actually received but that the Federal Government (for purposes of calculating Woolworth's federal foreign tax credit pursuant to 26 U. S. C. §§78, 901(a), and 902(a)) *deemed* Woolworth to have received from its foreign subsidiaries.[6]

---

[1] The English subsidiary operates about 2,000 stores, App. 39a, the Canadian company about 500, *id.*, at 24a, and the Mexican about 12. *Id.*, at 28a. The record does not specify the number of stores the German company owns, but the company may be between the English and Canadian operations in size.

[2] "'[B]usiness income' means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations . . . ." N. M. Stat. Ann. § 7-4-2(A) (1981).

[3] "All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three." N. M. Stat. Ann. § 7-4-10 (1981).

"The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period." § 7-4-11.

"The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for com-

[Footnote 4 is on p. 358]

---

pensation, and the denominator of which is the total compensation paid everywhere during the tax period." §7–4–14.

"The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in the state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period." §7–4–16.

[4] "'[N]onbusiness income' means all income other than business income." N. M. Stat. Ann. §7–4–2(D) (1981).

[5] "Rents and royalties from real or tangible personal property, capital gains, interest, *dividends*, or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in Sections 6 through 9 [7–4–6 to 7–4–9 NMSA 1978] of the Uniform Division of Income for Tax Purposes Act." N. M. Stat. Ann. §7–4–5 (1981) (emphasis added).

"Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state." §7–4–8.

New Mexico defines "commercial domicile" as "the principal place from which the trade or business of the taxpayer is directed or managed." §7–4–2(B).

[6] "If a domestic corporation chooses to have the benefits of subpart A of part III of subchapter N (relating to foreign tax credit) for any taxable year, *an amount equal to the taxes deemed to be paid by such corporation under section 902(a)* (relating to credit for corporate stockholder in foreign corporation) . . . for such taxable year *shall be treated for purposes of this*

On audit, the New Mexico Taxation and Revenue Department determined that, under state law, Woolworth should have included in its apportionable New Mexico income the dividends from its four foreign subsidiaries, the foreign exchange gain, and the $25.5 million gross-up figure. These additions increased Woolworth's apportioned New Mexico income from $84,622 to $401,518. App. 69a. The Department denied Woolworth's protest,[7] but this decision was

---

title . . . as a dividend received by such domestic corporation from the foreign corporation." 26 U. S. C. § 78 (emphasis added).

"If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall . . . be credited with the . . . taxes deemed to have been paid under sectio[n] 902 . . . ." § 901(a).

"For purposes of this subpart, a domestic corporation which owns at least 10 percent of the voting stock of a foreign corporation from which it receives dividends in any taxable year shall be deemed to have paid the same proportion of any income . . . taxes paid or deemed to be paid by such foreign corporation to any foreign country . . . on . . . the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends (determined without regard to section 78) bears to the amount of such accumulated profits in excess of such income . . . taxes (other than those deemed paid)." § 902(a).

Woolworth gives this example: "If a foreign subsidiary of a United States parent earns $100, pays foreign tax of $40, and pays a dividend of $30 out of its after-tax profits of $60, the deemed paid foreign tax credit of the parent under section 902(a) is 30/60 × $40, or $20. The parent includes $50 in dividend income (*i. e.*, the actual dividend of $30 plus $20 of 'gross-up') and claims a foreign tax credit of $20 against the federal income tax on this income." Brief for Appellant 6, n. 4. See 26 CFR §§ 1.78–1, 1.902–1(h), (k) (1982); S. Rep. No. 1881, 87th Cong., 2d Sess., 222–228 (1962); H. R. Rep. No. 1447, 87th Cong., 2d Sess., A79–A84 (1962); 3 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶ 69.2 (1981).

[7] Only one witness—Woolworth's tax manager—appeared before the Department's hearing examiner. The State introduced as evidence Woolworth's tax return, a notice of assessment, its worksheets, Woolworth's protest, and tax regulations. Woolworth introduced a one-page diagram of its corporate structure. See App. B to Brief for Appellee. The testimony given before the examiner and referred to in this opinion is uncontroverted unless otherwise noted.

The Department's decision and order did not mention Woolworth's foreign exchange gain. See App. to Juris. Statement 30a–38a.

reversed on appeal by the New Mexico Court of Appeals. *F. W. Woolworth Co.* v. *Bureau of Revenue,* 95 N. M. 542, 624 P. 2d 51 (1979).

As a matter of state law, the Court of Appeals excluded from apportionable New Mexico income Woolworth's receipt of the dividends at issue. The court stated that "[t]here is no indication that the income from Woolworth's long-standing investments [in its subsidiaries] was used either in taxpayer's unitary domestic business or in its business conducted in New Mexico . . . ." *Id.*, at 545, 624 P. 2d, at 54. With respect to the gross-up issue, the Court of Appeals said that the State's "rigid insistence" on inclusion of this amount "is a refusal to recognize an obviously fictitious income figure, made artificial by the federal reporting requirements for a specific purpose . . . ." *Id.*, at 543–544, 624 P. 2d, at 52–53. The court said that "'[g]ross-up' in fact represents income to taxpayer's foreign subsidiaries [that] is paid out in taxes to foreign governments," *id.*, at 544, 624 P. 2d, at 53, and not income in fact to the parent. The court thus likewise excluded this sum from Woolworth's apportionable New Mexico income.[8]

The New Mexico Supreme Court reversed over one dissent. 95 N. M. 519, 624 P. 2d 28 (1981). On the question whether Woolworth's receipt of dividends from its subsidiaries constituted apportionable New Mexico income, the court observed that, "[r]egrettably, it needs to be said that the State did a very poor job of inquiring into and developing the facts in this case." *Id.*, at 524, 624 P. 2d, at 33. The court nonetheless found substantial evidence to support the findings that the subsidiaries' dividend payments met the State's statutory test for inclusion in Woolworth's apportionable New Mexico income. On the constitutional issue, the court identified the "key question" after our decision in *Mobil Oil*

---

[8] The Court of Appeals did not refer to Woolworth's foreign exchange gain.

Corp. v. *Commissioner of Taxes of Vermont,* 445 U. S. 425 (1980), as "whether those dividends were income earned in a unitary business." 95 N. M., at 528, 624 P. 2d, at 37. The court stated:

> "The [dividend] income [from Woolworth's subsidiaries] is obviously related to the mutual activities of the parent and its affiliates. The control over the subsidiaries, the interdependence, the history of the relationships, the placing of the [dividend] money in [Woolworth's] general operating account, all point to functional integration and reveal an underlying unitary business for our purposes here." *Id.*, at 529, 624 P. 2d, at 38.

Respecting the State's inclusion of Woolworth's federal gross-up figure as apportionable state income, the court "deem[ed] it unnecessary to delve into all the intricacies of the federal laws and regulations," but found it sufficient "to say that, since Woolworth decided to use the gross-up option, the income taxes paid by Woolworth's foreign subsidiaries to foreign governments must be deemed to be received as dividends . . . ." *Id.*, at 521–522, 624 P. 2d, at 30–31. "Admittedly, the fictitious gross-up, which the state claims is 'business income' and which Woolworth deliberately acceded to, does not fit the ordinary definition of 'income' . . . ." *Id.*, at 522, 624 P. 2d, at 31. Nevertheless, the court noted that there was no claim and no lower court finding that Woolworth did not "obtain an economic benefit from the gross-up procedure here." *Id.*, at 523, 624 P. 2d, at 32. The court consequently rejected Woolworth's statutory and constitutional challenges to the State's inclusion of the federal gross-up figure in Woolworth's apportionable New Mexico business income.[9]

---

[9] The New Mexico Supreme Court also ruled that the Court of Appeals had erred in holding that it was reasonable to conclude that Woolworth had simply passed the foreign dividends through its general treasury to its stockholders, without using the dividends for Woolworth's general corpo-

II

This case was argued in tandem with *ASARCO Inc.* v. *Idaho State Tax Comm'n*, *ante*, p. 307, which also involved dividends and gains from foreign subsidiaries. We have reiterated today in *ASARCO* that "'[t]he "linchpin of apportionability" for state income taxation of an interstate enterprise is the "unitary-business principle."'" *Ante*, at 319, quoting *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 223 (1980), in turn quoting *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, *supra*, at 439.

Woolworth owns all the stock of three of its dividend payors and a 52.7% majority interest in the fourth. As a result, Woolworth (at least with respect to the three wholly owned companies) elects all of the subsidiaries' directors. It potentially has the authority to operate these companies as integrated divisions of a single unitary business. Our decision in *ASARCO* makes clear, however, that the *potential* to operate a company as part of a unitary business is not dispositive when, looking at "the 'underlying economic realities of a unitary business,'" the dividend income from the subsidiaries *in fact* is "derive[d] from 'unrelated business activity' which constitutes a 'discrete business enterprise.'" *Exxon*, *supra*, at 223–224, quoting *Mobil*, *supra*, at 441, 442, 439. See *ASARCO*, *ante*, at 322–323 (holding that a 52.7%-owned subsidiary is not part of its parent's unitary business).

---

rate purposes. The Supreme Court ruled that the burden of proof was on the taxpayer. Consequently, the court held, the State's reasonable inference that Woolworth had used the foreign dividends for its own corporate purposes was supportable in the absence of evidence to the contrary. 95 N. M., at 529, 624 P. 2d, at 38. The court further rejected Woolworth's claim that the apportionment formula should be adjusted if the dividend income were found to be apportionable. *Id.*, at 529–530, 624 P. 2d, at 38–39.

The dissenting justice founded his position on "agree[ment] with the analysis of the Court of Appeals." *Id.*, at 530, 624 P. 2d, at 39.

Neither the majority nor the dissenting opinion discussed Woolworth's foreign exchange gain.

A

The State Supreme Court in important part analyzed this case under a different legal standard. After stating that the existence of a unitary business relationship was the "key question," the court proceeded to resolve this question largely by emphasizing the potentials of the relationship between Woolworth and its subsidiaries:

> "The possession of large assets by subsidiaries is a business advantage of great value to the parent; 'it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige.' *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 166 . . . (1911)." 95 N. M., at 529, 624 P. 2d, at 38.

This reliance on the *Flint* case was error. *Flint* upheld a *federal* excise tax levied on corporate income.[10] The States, of course, are subject to limitations on their taxation powers that do not apply to the Federal Government. As relevant here, "the income attributed to [a] State for tax purposes must be rationally related to 'values connected with the taxing State.' *Norfolk & Western R. Co.* v. *State Tax Comm'n*, 390 U. S. 317, 325." *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 273 (1978). The state court's reasoning would trivialize this due process limitation by holding it satisfied if the income in question "adds to the riches of the corporation . . . ." *Wallace* v. *Hines*, 253 U. S. 66, 70 (1920). Income, from whatever source, always is a "business advantage" to a corporation. Our cases demand more. In particular, they specify that the proper inquiry looks to "the underlying unity or diversity of business enterprise," *Mobil*, *supra*, at 440, not to whether the nondomiciliary parent derives some economic benefit—as it virtually always will—from its ownership of stock in another corporation. See *ASARCO*, *ante*, at 325–329.[11]

---

[10] The tax did *not* apply to a corporation's receipt of dividends from other companies subjected to the tax. 220 U. S., at 144–145.

B

In *Mobil* we emphasized, as relevant to the right of a State to tax dividends from foreign subsidiaries, the question whether "contributions to income [of the subsidiaries] result[ed] from functional integration, centralization of management, and economies of scale." 445 U. S., at 438. If such "factors of profitability" arising "from the operation of the business as a whole" exist and evidence the operation of a unitary business, a State can gain a justification for its tax consideration of value that has no other connection with that State. *Ibid.* We turn now to consider the extent, if any, to which these factors exist in this case.

There was little functional integration. Woolworth's subsidiaries engaged exclusively in the business of retailing—the purchase of wholesale goods for resale to final consumers. This type of business differs significantly from the "highly integrated business" of locating, processing, and marketing a resource (such as petroleum) that we previously have found to constitute a unitary business. *Exxon*, 447 U. S., at 224. See also *id.*, at 226 (describing "a unitary stream of income, of which the income derived from internal transfers of raw materials from exploration and production to refining is a part"); *Mobil*, 445 U. S., at 428. Consistent with this distinction, the evidence in this case is that *no* phase of any subsidiary's business was integrated with the parent's. With respect to "who makes the decision for seeing to the merchandise, [store] site selection, advertising and accounting control," the undisputed testimony stated that "[e]ach subsidiary performs these functions autonomously and independently of the parent company." App. 12a.[12] "Each subsidiary has a complete accounting department and a financial staff." *Id.*, at 14a. Each had its own outside counsel. App. to Juris. Statement 34a. It further appears that Woolworth engaged in no centralized purchasing, manufacturing, or warehousing of merchandise.[13] The parent had no central personnel train-

---

[11] The hearing examiner and the New Mexico Supreme Court also thought it significant that Woolworth had commingled its dividends with its general funds and had used them for general corporate operating purposes. See 95 N. M., at 529, 624 P. 2d, at 38; n. 9, *supra*. This analysis likewise subverts the unitary-business limitation. *All* dividend income—irrespective of whether it is generated by a "discrete business enterprise," *Mobil*, 445 U. S., at 439—would become part of a unitary business if the test were whether the corporation commingled dividends from other corporations, whether subsidiaries or not.

---

[12] The testimony before the Department's hearing examiner, see n. 7, *supra*, focused primarily on the English and German subsidiaries. With respect to the Mexican and Canadian subsidiaries, the evidence was confined to the following:

"Q. Now, I would like to[,] without repeating every question if I may[,] ask a summary question concerning the Canadian and the Mexican subsidiaries, we are talking about decisions concerning merchandise mix, site selection, advertising, accounting, training of personnel, and of those items[,] would you say that there is a similarity between the relationship of the U. S. parent to Canada as there is to the German and the English subsidiaries to the extent to which these things are decentralized?

"A. Yes, there is a distinct similarity or philosophy involved in the ownership of these companies." App. 18a.

The State did not undertake to controvert the implications of this statement, and neither of the courts below found any difference in the relationships between the parent and each of the four subsidiaries. We thus must assume that the relationship between the parent and the Mexican and Canadian subsidiaries paralleled that between the parent and the English and German subsidiaries in material respects.

[13] The New Mexico Supreme Court did state that "[t]here is some flow back and forth of goods" between the parent and the subsidiaries. 95 N. M., at 524, 624 P. 2d, at 33. It cited no evidence in support of this statement. Neither the Department's hearing examiner nor the Court of Appeals made such a finding. The testimony in the record was that there were not "any inter-company sales of inventory." App. 13a.

The Woolworth witness also stated that, with respect to certain types of goods manufactured by other of the parent's subsidiaries, he lacked actual knowledge of whether there were intercompany sales. He continued that ing school for its foreign subsidiaries. *Ibid.* And each subsidiary was responsible for obtaining its own financing from sources other than the parent.[14] In sum, the record is persuasive that Woolworth's operations were not functionally integrated with its subsidiaries.

We now consider the extent to which there was centralization of management or achievement of other economies of scale. It appears that each subsidiary operated as a distinct business enterprise at the level of fulltime management. With one possible exception,[15] none of the subsidiaries' officers during the year in question was a current or former employee of the parent. *Ibid.* The testimony was that the subsidiaries "figure that their operations are independent, autonomous." App. 13a. Woolworth did not "rotate per-

---

the idea was "inconceivable to me because of the autonomous operation of the company and the lack of coordination and other facets." *Id.*, at 43a. Upon further questioning, the witness conceded that he did not "really know where [the English subsidiary's managers] buy their merchandise." But he affirmed his knowledge that the English company's sales to and purchases from the parent were "virtually nil." *Id.*, at 44a. When questioned whether Woolworth utilized a central buying office for it and its subsidiaries, the witness replied that it did not. *Id.*, at 14a. No other evidence indicated that the parent and the subsidiaries engaged in any joint manufacturing, purchasing, or warehousing functions. Nor did the New Mexico courts find otherwise.

[14] Woolworth had no outstanding debts from its English subsidiary, App. to Juris. Statement 35a, and it had not reinvested its dividends in that company. App. 51a. The parent had reinvested dividends in the German company, *id.*, at 52a, but the last additional capital contribution by the parent that the witness could recall, *id.*, at 46a, was a $400,000 transfer made after the German company was demolished during World War II. *Id.*, at 30a. See App. to Juris. Statement 35a.

[15] The hearing examiner found that "[i]n the taxable year involved, none of the four subsidiarie[s'] officers were currently or formerly employees of the parent." *Id.*, at 34a. Without explanation, he also later stated that "[a]t least one officer of the Canadian subsidiary [was] also an officer of the [parent]." *Ibid.*

One officer from the Mexican subsidiary was a participant in Woolworth's profit-sharing plan. Woolworth paid the employee's share of this plan. *Ibid.*

sonnel or train personnel to operate stores in those countries. There is no exchange of personnel." *Ibid.* There was no "training program that is central to transmit the Woolworth idea of merchandising[,] such as it may be[,] to the foreign subsidiaries." *Id.*, at 15a. The subsidiaries "proceed . . . with their own programs, either formal or informal. They develop their own managers and instruct them in their methods of operation." *Ibid.*

This management decentralization was reflected in the fact that each subsidiary possessed autonomy to determine its own policies respecting its primary activity—retailing. According to the hearing examiner:

> "Each of the four subsidiaries are responsible for determining the size and location of retail stores, the market conditions in their own territory and the mix of items to be sold. The German subsidiary emphasizes soft goods such as dresses and coats. It sells no food. The English subsidiary operates restaurants in its stores and also operates supermarkets. Each subsidiary attempts to cater to local tastes and needs. The inventory of each subsidiary consists, in large part, of home country produced items. This purchase-at-home practice is consistent with the policy of the taxpayer. A number of inventory items are purchased from the Orient or other places but there is no evidence that the subsidiaries purchase, or are required to purchase, inventory items from any particular source." App. to Juris. Statement 33a–34a.

Importantly, the Department's hearing examiner found that Woolworth had "no department or section, as such, devoted to overseeing the foreign subsidiary operations." *Id.*, at 34a.[16] Neither the parent corporation nor any of the subsidiaries consolidates its tax return with any of the other companies. App. 37a–38a. The tax manager for Woolworth stated that he did not review the subsidiaries' tax returns or consult with them on decisions affecting taxes. *Id.*, at 14a. There was no "policy of the parent that all of the managers of all the operations get together periodically to discuss the overall Woolworth operations." *Id.*, at 35a.[17]

---

[16] Woolworth had one vice president "who is the liaison man with the smaller foreign subsidiaries," *ibid.*, such as the Spanish and Mexican subsidiaries. App. 50a. The testimony was that this liaison man "from time to time . . . may have contact with the major subsidiaries . . . ." *Ibid.*

There were some managerial links. Woolworth maintained one or several common directors with some of the subsidiaries.[18] There also was irregular in-person[19] and "frequent" mail, telephone, and teletype communication between the upper echelons of management of the parent and the subsidiaries.[20] App. to Juris. Statement 34a. Decisions about major financial decisions, such as the amount of dividends to be paid by the subsidiaries and the creation of substantial debt, had to be approved by the parent.[21] *Id.*, at 35a. Woolworth's published financial statements, such as its annual reports, were prepared on a consolidated basis.[22] *Ibid.*

---

[17] The witness replied that "[t]here hasn't been that" in response to the questions of whether "all of the managers of all of the operations" ever "get together and talk together about where the company is going or what it is doing or where it should be tomorrow or in ten years from today? Planning for future programs or for future expansion?" *Id.*, at 35a.

[18] The managing director of the English subsidiary sat as one of the parent's 15 directors, and the parent sent one of its officers to participate in meetings of the English board of directors. The state hearing examiner also found that "[a]t least one person who is on the Canadian subsidiary is also on the taxpayer's board." App. to Juris. Statement 34a. Cf. App. 41a (at least *three* members of the Canadian board of directors also sat on the parent's board). Although the Department's hearing examiner did not make findings in this connection, there was testimony that "some of the directors of Woolworth, the taxpayer, sit on the Board of the Mexican subsidiary . . . ." *Id.*, at 29a.

[19] "It would be on a rare occasion, once a year," that the "managing directors" of the foreign subsidiaries would come to New York. *Id.*, at 34a. "It is only sporadically that the parent company is represented at the [English company's] Board meetings." *Id.*, at 40a. Further, while Woolworth's chief executive officer and other officers would "on occasion" travel to confer with the subsidiaries' managers, it was "hard to discern any pattern of regular monthly visits or quarterly visits." *Id.*, at 35a.

[20] "The exchange of information contacts by the subsidiaries is made by the Chief Executive of the company. The Director of Purchases of the parent company does not confer with the Director of Purchasing of the Canadian company or of the German company." *Id.*, at 37a.

We conclude, on the basis of undisputed facts, that the four subsidiaries in question are not a part of a unitary business under the principles articulated in *Mobil* and *Exxon*, and today reiterated in *ASARCO*. Except for the type of occasional oversight—with respect to capital structure, major debt, and dividends—that any parent gives to an investment in a subsidiary, there is little or no integration of the business activities or centralization of the management of these five corporations. Woolworth has proved that its situation differs from that in *Exxon*, where the corporation's Coordination and Services Management office was found to provide for the asserted unitary business

---

[21] The testimony was that "the Canadian financial people have the right to finance their day-to-day operations and I doubt that they would be required . . . at the level of a million dollars to seek the permission of the parent company. If there was really substantial borrowings going on, I am sure the Canadians before borrowing . . . would obtain permission of the parent company." *Id.*, at 26a. More generally, the witness stated that "[n]ormally, I would think that substantial borrowing, an unusual amount, would necessitate the checking with the principal stockholders or the Board of Directors." *Id.*, at 28a.

[22] The English subsidiary was not included in the consolidated statements. App. to Juris. Statement 35a. Cf. Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 Hastings L. J. 42, 52 (1960) ("Central accounting, for instance, may result in some savings, but in most instances the amount is trifling in comparison with the income [involved]. Alone considered, it is too weak a connecting link to bind into one business, what would otherwise, from an operational standpoint, be considered separate businesses").

As noted, there was no centralized tax department and no consolidation of tax returns.

In addition to the links set forth in the text, it is plain that the parent and the four subsidiaries all utilize the same general "F. W. Woolworth" corporate name. There is no record information on the significance of the use of this common name. Neither the Department nor the New Mexico Supreme Court gave any weight to use of a common corporate name when sustaining the tax at issue.

> "long-range planning for the company, maximization of overall company operations, development of financial policy and procedures, financing of corporate activities, maintenance of the accounting system, legal advice, public relations, labor relations, purchase and sale of raw crude oil and raw materials, and coordination between the refining and other operating functions 'so as to obtain an optimum short range operating program.'" 447 U. S., at 211.

In this case the parent company's operations are not interrelated with those of its subsidiaries so that one's "stable" operation is important to the other's "full utilization" of capacity. *Id.*, at 218. See also *id.*, at 225. The Woolworth parent did not provide "many essential corporate services" for the subsidiaries, and there was no "centralized purchasing office . . . whose obvious purpose was to increase overall corporate profits through bulk purchases and efficient allocation of supplies among retailers." *Id.*, at 224.[23] And it was not the case that "sales were facilitated through the use of a uniform credit card system, uniform packaging, brand names, and promotional displays, all run from the national headquarters." *Ibid.* See also *Mobil*, 445 U. S., at 428, 435.[24]

---

[23] Cf. *Butler Bros.* v. *McColgan*, 315 U. S. 501, 508 (1942).

[24] In *Mobil*, the Court relied upon *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Comm'n*, 266 U. S. 271 (1924):

"A British corporation manufactured ale in Great Britain and sold some of it in New York. The corporation objected on due process grounds to New York's imposition of an apportioned franchise tax on the corporation's net income. The Court sustained the tax on the strength of its earlier decision in *Underwood Typewriter Co.* v. *Chamberlain*, [254 U. S. 113 (1920)], where it had upheld a similar tax as applied to a business operating in several of our States. It ruled that the brewer carried on a unitary business, involving 'a series of transactions beginning with the manufacture in Eng-

There is a critical distinction between a retail merchandising business as conducted by Woolworth and the type of multinational business—now so familiar—in which refined, processed, or manufactured products (or parts thereof) may be produced in one or more countries and marketed in various countries, often worldwide.[25] In operations of this character there is a flow of international trade, often an interchange of personnel, and substantial mutual interdependence. The uncontradicted evidence demonstrates that Woolworth's international retail business is not comparable. There is no flow of international business. Nor is there any integration or unitary operation in the sense in which our cases consistently have used these terms.

In *Mobil*, we recognized:

> "[A]ll dividend income received by corporations operating in interstate commerce is [not] necessarily taxable in each State where that corporation does business. Where the business activities of the dividend payor have nothing to do with the activities of the recipient *in the taxing State*, due process considerations might well preclude apportionability, because there would be no underlying unitary business." *Id.*, at 441–442.

---

land and ending in sales in New York and other places'. . . . 266 U. S., at 282." *Mobil*, 445 U. S., at 438.

There is no comparable "series of transactions" in this case linking the retail merchandise business of Woolworth's foreign subsidiaries with its business in New Mexico.

[25] See *Hans Rees' Sons* v. *North Carolina ex rel. Maxwell*, 283 U. S. 123, 133 (1931) ("Undoubtedly, the enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits"); Hellerstein, Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business, 21 Nat. Tax J. 487, 496 (1968) ("Manufacturing or purchasing goods in one state and selling in another, and transportation and communication between the states are typical of cases considered unitary"); G. Altman & F. Keesling, Allocation of Income in State Taxation 101–102 (1946).

This is such a case. Each of the foreign subsidiaries at issue operates a "discrete business enterprise," *Mobil, supra,* at 439, with a notable absence of any "umbrella of centralized management and controlled interaction." *Exxon,* 447 U. S., at 224. New Mexico, in taxing a portion of dividends received from such enterprises, is attempting to reach "extraterritorial values," *Mobil, supra,* at 442, wholly unrelated to the business of the Woolworth stores in New Mexico. As a result, a "showing has been made that income unconnected with the unitary business has been used in the" levy of the New Mexico tax. *Butler Bros.* v. *McColgan,* 315 U. S. 501, 509 (1942). We conclude that this tax does not bear the necessary relationship "'to opportunities, benefits, or protection conferred or afforded by the taxing State. See *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 444.'" *Norfolk & Western R. Co.* v. *Missouri State Tax Comm'n,* 390 U. S. 317, 325, n. 5 (1968), quoting *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U. S. 169, 174 (1949). New Mexico's tax thus fails to meet established due process standards.

III

We need not be detained by New Mexico's reaching out to tax "gross-up" amounts that even the Supreme Court of New Mexico recognized as "fictitious." 95 N. M., at 522, 624 P. 2d, at 31. The gross-up computation is a figure that the Federal Government "deems" Woolworth to have received for purposes of part of Woolworth's federal foreign tax credit calculation. It "is treated [for this purpose] as a dividend in the same manner as a dividend actually received by the domestic corporation from a foreign corporation." H. R. Rep. No. 1447, 87th Cong., 2d Sess., A83 (1962). See also S. Rep. No. 1881, 87th Cong., 2d Sess., 227 (1962). In this case the foreign tax credit arose from the taxation by foreign nations of Woolworth foreign subsidiaries that had no unitary business relationship with New Mexico. New Mexico's effort to tax this income "deemed received"—with respect to which New Mexico contributed nothing—also must be held to contravene the Due Process Clause.[26]

IV

The judgment of the Supreme Court of New Mexico is reversed.

It is so ordered.

[For concurring opinion of THE CHIEF JUSTICE, see *ante*, p. 331.]

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN and JUSTICE REHNQUIST join, dissenting.

The $39.9 million in dividend income at issue in this case was earned by four foreign subsidiaries of F. W. Woolworth Co.: F. W. Woolworth GmbH (Germany), F. W. Woolworth, Ltd. (Canada), F. W. Woolworth, S. A. de C. V. Mexico (Mexico), and F. W. Woolworth Co., Ltd. (England). F. W. Woolworth Co. wholly owned its German, Canadian, and Mexican subsidiaries, and had a 52.7% interest in its English subsidiary. During the tax year in question the subsidiaries apparently operated somewhat autonomously in their respective markets, but "mail, telephone, and teletype communication between the upper echelons of management of the parent and the subsidiaries" was "'frequent.'" *Ante*, at 368 (footnote omitted) (quoting App. to Juris. Statement 34a). Moreover, "[d]ecisions about major financial decisions, such as the amount of dividends to be paid by the subsidiaries and the creation of substantial debt, had to be approved by the parent," and "Woolworth's published financial statements, such as its annual reports, were prepared on a consolidated basis." *Ante*, at 368–369 (citations and footnotes omitted).

---

[26] Woolworth challenges only New Mexico's tax treatment of its dividend and gross-up income. See Juris. Statement i; Brief for Appellant i. We therefore do not consider New Mexico's tax treatment of other items of Woolworth income. In particular, we do not pass upon the proper treatment of Woolworth's foreign exchange gain—a matter that was not considered below. See nn. 7–9, *supra*.

These controlled subsidiaries, operating in geographically diverse markets in the same line of business as F. W. Woolworth itself, were simply not "unrelated,"[1] "discrete business enterprise[s],"[2] "hav[ing] nothing to do with the activities"[3] of F. W. Woolworth in New Mexico. Because I disagree with the redefinition of the limits of a unitary business adopted today by the Court, and for the reasons expressed in my dissent in No. 80–2015, *ASARCO Inc.* v. *Idaho State Tax Comm'n*, *ante*, p. 331, which was argued in tandem with this case, I respectfully dissent.

---

[1] *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, 445 U. S. 425, 439 (1980).

[2] *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U. S. 207, 224 (1980).

[3] *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, *supra*, at 442.

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC. *v.* PENNSYLVANIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-280. Argued March 3, 1982—Decided June 29, 1982*

Respondents—the Commonwealth of Pennsylvania and several black individuals representing a class of racial minorities who are skilled or seek work as operating engineers in the construction industry in Eastern Pennsylvania and Delaware—brought an action in Federal District Court under 42 U. S. C. § 1981, seeking to redress alleged racial discrimination in the operation of an exclusive hiring hall established in collective-bargaining contracts between the local union representing operating engineers and petitioner trade associations and construction industry employers. Respondents also alleged discrimination in the operation of an apprenticeship program established by the union and the trade associations and administered by the Joint Apprenticeship and Training Committee (JATC), half of whose members are appointed by the union and half by the trade associations. Named as defendants were the union and petitioners. The District Court found that although the hiring hall system was neutral on its face, the union in administering the system practiced a pattern of intentional discrimination, and the court also found similar discrimination in the JATC's administration of the apprenticeship program. On the basis of these findings, the court held that the union and the JATC had violated § 1981, and that, although petitioners as a class did not intentionally discriminate against minority workers and were not aware of the union's discriminatory practices, they were nevertheless liable under § 1981 for the purpose of imposing an injunctive remedy. The court reasoned that liability under § 1981 requires no proof of purposeful conduct on any of the defendants' part, but it was sufficient that the employers delegated the hiring procedure to the union and that the union, in effectuating this delegation, intentionally discriminated or, alternatively, produced a discriminatory impact. The

---

*Together with No. 81-330, *United Engineers & Constructors, Inc.* v. *Pennsylvania et al.;* No. 81-331, *Contractors Association of Eastern Pennsylvania et al.* v. *Pennsylvania et al.;* No. 81-332, *Glasgow, Inc.* v. *Pennsylvania et al.;* and No. 81-333, *Bechtel Power Corp.* v. *Pennsylvania et al.*, also on certiorari to the same court.

court concluded that respondents had shown the requisite relationship among the employers, trade associations, and union to render applicable the theory of *respondeat superior*, thus making petitioners liable for the union's discriminatory acts. The Court of Appeals affirmed.

Held:

1. Liability may not be imposed under § 1981 without proof of intentional discrimination. This conclusion is supported by the legislative history. The fact that the prohibitions of § 1981 encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination, whether public or private. Pp. 382–391.

2. The District Court was unable to find discriminatory intent on petitioners' part, and liability under § 1981 cannot be vicariously imposed on them based on the discriminatory conduct of the union or the JATC. Pp. 391–397.

(a) There is no basis for holding petitioners liable under the doctrine of *respondeat superior*. The union, in operating the hiring hall, performed no function as the agent or servant of petitioner trade associations. Nor can the relationship between petitioner employers and the union be characterized as one between principal and agent without proof of a right to control the union's activities. Such a conception is alien to the fundamental assumption upon which the federal labor laws are structured and was not established by the evidence on which the District Court relied. And there is no evidence that an agency relationship existed between petitioners and the JATC. The fact that the employers fund the JATC does not render the JATC the employers' servant or agent, nor does the fact that the trade associations appoint half of the JATC's members infer a right of the associations to control the JATC. Pp. 391–395.

(b) Nor is there any basis for holding petitioners liable on the ground that § 1981 imposes a "nondelegable duty" on them to see that discrimination does not occur in the selection of their work force. Section 1981 does no more than prohibit petitioners from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract, and was not intended to make them guarantors of the workers' rights against third parties who would infringe them. Pp. 395–397.

3. The District Court had no inherent power under its traditional equitable authority to allocate to petitioners a portion of the costs of the remedial decree, absent a supportable finding of liability upon petitioners' part. Nor does the All Writs Act constitute an independent basis for the injunctive portions of the District Court's order running against petitioners. There was no need to treat petitioners as strangers to the

suit and therefore to rely upon some extraordinary form of procedure or writ to bring them before the court, since they were named as defendants and litigated the issue of injunctive liability. Pp. 397–402.

648 F. 2d 923, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined, and in Parts III and IV of which STEVENS, J., joined. O'CONNOR, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 403. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 405. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 407.

John J. McAleese, Jr., argued the cause for petitioners in Nos. 81–330, 81–331, 81–332, and 81–333. With him on the briefs for petitioners in Nos. 81–331 and 81–332 was *Thomas J. McGoldrick*. *Bernard G. Segal*, *Martin Wald*, and *Nicholas N. Price* filed briefs for petitioner in No. 81–330. *Robert W. Kopp* and *David M. Pellow* filed briefs for petitioner in No. 81–333.

John G. Kester argued the cause for petitioner in No. 81–280. With him on the briefs was *John J. Buckley, Jr.*

Harold I. Goodman argued the cause for respondents in all cases. With him on the brief for individual and class respondents were *Jonathan M. Stein* and *Robert J. Reinstein*. *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, and *Joel M. Ressler*, *Louis J. Rovelli*, and *Margaret Hunting*, Assistant Attorneys General, filed a brief for respondent Commonwealth of Pennsylvania. *Kenneth I. Jonson* filed a brief for respondent Local 542, International Union of Operating Engineers.†

---

†Briefs of *amici curiae* urging reversal were filed by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby* for the Equal Employment Advisory Council; by *Anthony J. Obadal* and *Alan D. Cirker* for the National Constructors Association; and by *Daniel J. Popeo*, *Paul D. Kamenar*, and *Nicholas E. Calio* for the Washington Legal Foundation.

Thomas I. Atkins and *Michael H. Sussman* filed a brief for the National Association for the Advancement of Colored People as *amicus curiae* urging affirmance.

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents, the Commonwealth of Pennsylvania and the representatives of a class of racial minorities who are skilled or seek work as operating engineers in the construction industry in Eastern Pennsylvania and Delaware, commenced this action under a variety of federal statutes protecting civil rights, including 42 U. S. C. § 1981. The complaint sought to redress racial discrimination in the operation of an exclusive hiring hall established in contracts between Local 542 of the International Union of Operating Engineers and construction industry employers doing business within the Union's jurisdiction. Respondents also alleged discrimination in the operation of an apprenticeship program established by Local 542 and several construction trade associations. Named as defendants were Local 542, the trade associations, the organization charged with administering the trade's apprenticeship program, and a class of approximately 1,400 construction industry employers. Petitioners, the defendant contractors and trade associations, seek review of a judgment granting an injunction against them. The questions we resolve are whether liability under 42 U. S. C. § 1981 requires proof of discriminatory intent and whether, absent such proof, liability can nevertheless be imposed vicariously on the employers and trade associations for the discriminatory conduct of the Union.

I

The hiring hall system that is the focus of this litigation originated in a collective-bargaining agreement negotiated in 1961 by Local 542 and four construction trade associations in the Philadelphia area, three of whom are petitioners in this Court.[1] The agreement was concluded only after a 10-week strike prompted by the resistance of the trade associations to the Union's demand for an exclusive hiring hall.[2] Under the terms of the agreement, the Union was to maintain lists of operating engineers, or would-be engineers, classified according to the extent of their recent construction experience. Signatory employers were contractually obligated to hire operating engineers only from among those referred by the Union from its current lists. Workers affiliated with the Union were barred from seeking work with those employers except through Union referrals. Thus, the collective-bargaining agreement effectively channeled all employment opportunities through the hiring hall. Since 1961 this requirement has been a constant feature of contracts negotiated with Local 542 by the trade associations, as well as of contracts signed with the Union by employers who were not represented by one of those associations in collective bargaining.[3]

---

[1] The petitioner associations are the General Building Contractors Association (GBCA), the Contractors Association of Eastern Pennsylvania (CAEP), and the United Contractors Association (UCA). The fourth

Among the means of gaining access to the Union's referral lists is an apprenticeship program established in 1965 by Local 542 and the trade associations. The program, which involves classroom and field training, is administered by the Joint Apprenticeship and Training Committee (JATC), a body of trustees half of whom are appointed by the Union and half by the trade associations. While enrolled in the program, apprentices are referred by the Union for unskilled construction work. Graduates of the program become journeymen operating engineers and are referred for heavy equipment jobs.

---

group, the Pennsylvania Excavating Contractors Association, was dissolved in 1972 after the commencement of this action.

[2] A second strike occurred in 1963 when the contractor associations unsuccessfully sought to remove the hiring hall provision from the area collective-bargaining agreement.

[3] The District Court found that "a vast majority of the employers are not and have not been active members of the defendant associations." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 342 (ED Pa. 1978). Nevertheless, the court found that "the negotiations conducted by those bodies have established a standard to which the unaffiliated contractors may conform." *Ibid.*

This action was filed in 1971 by the Commonwealth of Pennsylvania and 12 black plaintiffs representing a proposed class of minority group members residing within the jurisdiction of Local 542. The complaint charged that the Union and the JATC had violated numerous state and federal laws prohibiting employment discrimination, including Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), and 42 U. S. C. § 1981. The complaint alleged that these defendants had engaged in a pattern and practice of racial discrimination, by systematically denying access to the Union's referral lists, and by arbitrarily skewing referrals in favor of white workers, limiting most minority workers who did gain access to the hiring hall to jobs of short hours and low pay. The contractor employers and trade associations were also named as defendants, although the complaint did not allege a Title VII cause of action against them.[4]

The District Court divided the trial into two stages. See *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 348 (ED Pa. 1978). The first stage, from which petitioners appeal, addressed issues of liability; assessment of damages was deferred to a second stage. For purposes of the first phase of the proceedings, the court certified a plaintiff class of minority operating engineers and would-be engineers, as well as a defendant class consisting of all trade associations and employers who had been parties to labor contracts with Local 542. A single employer, petitioner Glasgow, Inc., was certified to represent the defendant subclass of approximately 1,400 contractor employers.[5]

---

[4] The complaint did not assert a Title VII cause of action against petitioners because they were not named in the complaint filed by the plaintiffs with the Equal Employment Opportunity Commission, a precondition to suit in federal court. See Brief for Individual and Class Respondents 12, n. 18.

[5] Certification of this class evidently was influenced by the District Court's conclusion that liability could be imposed without regard to individualized issues such as the intent or work-force statistics of the individual employers. See 469 F. Supp., at 384, 414. The court emphasized that the determination of liability in damages could require individualized proof; it

The District Court's opinion in the liability phase of the trial is lengthy. For our purposes, however, the relevant findings and conclusions can be summarized briefly. First, the court found that the hiring hall system established by collective bargaining was neutral on its face. *Id.*, at 342. Indeed, after May 1, 1971, the contracts contained a provision expressly prohibiting employment discrimination on the basis of race, religion, color, or national origin. *Id.*, at 340, and n. 6. But the court found that Local 542, in administering the system, "practiced a pattern of intentional discrimination and that union practices in the overall operation of a hiring hall for operating engineers created substantial racial disparities." *Id.*, at 370. The court made similar findings regarding the JATC's administration of the job-training program. *Id.*, at 384. On the basis of these findings, the District Court held that Local 542 and the JATC had violated Title VII, both because they intentionally discriminated and because they enforced practices that resulted in a disparate racial impact. *Id.*, at 397–399.[6] The court also interpreted 42 U. S. C. § 1981 to permit imposition of liability "on roughly the same basis as a Title VII claim," 469 F. Supp., at 401, and therefore concluded that the Union and the JATC had also violated § 1981. *Id.*, at 399–401.

Turning to petitioners' liability under § 1981, the court found that the plaintiffs had failed to prove "that the associations or contractors viewed simply as a class were actually aware of the union discrimination," *id.*, at 401, and had failed to show "intent to discriminate by the employers as a class," *id.*, at 412. Nevertheless, the court held the employers and the associations liable under § 1981 for the purpose of impos-

---

therefore held out the possibility that the defendant class might be decertified in the second stage of the proceedings. *Id.*, at 413, 415, 419–420.

[6] The District Court's legal conclusions addressed only the liability of Local 542. The court explained: "Because of the JATC's participation in the overall intentional discrimination of the union, there is no need to discuss its legal liability separately. The JATC is liable as the union is liable." *Id.*, at 401, n. 52.

ing an injunctive remedy "as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers and associations knew or should have known [of the Union's conduct]." *Id.*, at 401. The court reasoned that liability under § 1981 "requires no proof of purposeful conduct on the part of any of the defendants." *Id.*, at 407. Instead, it was sufficient that "(1) the employers delegated an important aspect of their hiring procedure to the union; [and that] (2) the union, in effectuating the delegation, intentionally discriminated or, alternatively, produced a discriminatory impact." *Id.*, at 412. "[P]laintiffs have shown that the requisite relationship exists among employers, associations, and union to render applicable the theory of *respondeat superior*, thus making employers and associations liable injunctively for the discriminatory acts of the union." *Id.*, at 413.[7]

Following an appeal authorized by 28 U. S. C. § 1292(b), the Court of Appeals for the Third Circuit, sitting en banc, affirmed the judgment of liability against petitioners by an equally divided vote. 648 F. 2d 923 (1981). We granted certiorari, 454 U. S. 939 (1981), and we now reverse.

II

The District Court held that petitioners had violated 42 U. S. C. § 1981 notwithstanding its finding that, as a class, petitioners did not intentionally discriminate against minority workers and neither knew nor had reason to know of the Union's discriminatory practices. The first question we address, therefore, is whether liability may be imposed under § 1981 without proof of intentional discrimination.[8]

---

[7] The District Court absolved petitioners of liability under 42 U. S. C. § 1985(3) (1976 ed., Supp. IV), noting that "no per se or vicarious liability theory could be used to hold a class of employers liable for conspiracy to commit the discrimination practiced by the union." 469 F. Supp., at 413. Absent such a theory, the plaintiffs could not prevail because "there was no sufficient proof that as a class the employers agreed to violate equal protection rights or equal privileges and immunities." *Ibid.* Moreover, "[n]ot even acquiescence of the whole class of employers in the sense of a conscious toleration of the discrimination of the union ha[d] been shown." *Ibid.*

In light of its disposition, the court found it unnecessary to address other causes of action alleged by the plaintiffs. See *id.*, at 386, n. 43.

Title 42 U. S. C. § 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

We have traced the evolution of this statute and its companion, 42 U. S. C. § 1982,[9] on more than one occasion, see, *e. g., McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 287–296 (1976); *Runyon* v. *McCrary*, 427 U. S. 160, 168–170 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 422–437 (1968), and we will not repeat the narrative again except in broad outline.

---

[8] The District Court concluded, by analogy to Title VII, that a violation of § 1981 could be made out by "proof of disparate impact alone." *Id.*, at 401. The court referred to *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), in which we held that Title VII forbids the use of employment tests that produce a disproportionate racial impact unless the employer shows "a manifest relationship to the employment in question," *id.*, at 432. See *Teamsters* v. *United States*, 431 U. S. 324, 335–336 (1977).

The District Court's holding on this issue is contrary to the holding of every Court of Appeals that has addressed the matter, including that of the Third Circuit in a subsequent case. See *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 633 F. 2d 232, 263–268 (CA2 1980), cert. granted, 454 U. S. 1140 (1982); *Croker* v. *Boeing Co.*, 662 F. 2d 975, 984–989 (CA3 1981) (en banc); *Williams* v. *DeKalb County*, 582 F. 2d 2 (CA5 1978); *Mescall* v. *Burrus*, 603 F. 2d 1266, 1269–1271 (CA7 1979); *Craig* v. *County of Los Angeles*, 626 F. 2d 659, 668 (CA9 1980), cert. denied, 450 U. S. 919 (1981); *Chicano Police Officer's Assn.* v. *Stover*, 552 F. 2d 918, 920–921 (CA10 1977). Two other Circuits have approved a requirement of discriminatory intent in dicta. See *Des Vergnes* v. *Seekonk Water Dist.*, 601 F. 2d 9, 14 (CA1 1979); *Detroit Police Officers' Assn.* v. *Young*, 608 F. 2d 671, 692 (CA6 1979), cert. denied, 452 U. S. 938 (1981). See also *Johnson* v. *Alexander*, 572 F. 2d 1219, 1223–1224 (CA8), cert. denied, 439 U. S. 986 (1978); *Donnell* v. *General Motors Corp.*, 576 F. 2d 1292, 1300 (CA8 1978). But see *Kinsey* v. *First Regional Securities, Inc.*, 181 U. S. App. D. C. 207, 215, n. 22, 557 F. 2d 830, 838, n. 22 (1977).

The operative language of both laws apparently originated in § 1 of the Civil Rights Act of 1866, 14 Stat. 27, enacted by Congress shortly after ratification of the Thirteenth Amendment.[10] "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia* v. *Rachel*, 384 U. S. 780, 791 (1966). The same Congress also passed the Joint Resolution that was later adopted as the Fourteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess., 3148–3149, 3042 (1866). As we explained in *Hurd* v. *Hodge*, 334 U. S. 24, 32–33 (1948) (footnotes omitted):

> "Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment

---

[9] Section 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[10] Section 1 of the Act of Apr. 9, 1866, read in part:

"That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

> were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States."

Following ratification of the Fourteenth Amendment, Congress passed what has come to be known as the Enforcement Act of 1870, 16 Stat. 140, pursuant to the power conferred by § 5 of the Amendment. Section 16 of that Act contains essentially the language that now appears in § 1981.[11] Indeed, the present codification is derived from § 1977 of the Revised Statutes of 1874, which in turn codified verbatim § 16 of the 1870 Act. Section 16 differed from § 1 of the 1866 Act in at least two respects. First, where § 1 of the 1866 Act extended its guarantees to "citizens, of every race and color," § 16 of the 1870 Act—and § 1981—protects "all persons." See *United States* v. *Wong Kim Ark*, 169 U. S. 649, 675

---

[11] "That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void." 16 Stat. 144.

Section 18 of the 1870 Act also re-enacted the 1866 Act and declared that § 16 "shall be enforced according to the provisions of said act." *Ibid.*

(1898). Second, the 1870 Act omitted language contained in the 1866 Act, and eventually codified as § 1982, guaranteeing property rights equivalent to those enjoyed by white citizens. Thus, "[a]lthough the 1866 Act rested only on the Thirteenth Amendment . . . and, indeed, was enacted before the Fourteenth Amendment was formally proposed, . . . the 1870 Act was passed pursuant to the Fourteenth, and changes in wording may have reflected the language of the Fourteenth Amendment." *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U. S. 431, 439–440, n. 11 (1973). See *Runyon* v. *McCrary*, *supra*, at 168–170, n. 8.

In determining whether § 1981 reaches practices that merely result in a disproportionate impact on a particular class, or instead is limited to conduct motivated by a discriminatory purpose, we must be mindful of the "events and passions of the time" in which the law was forged. *United States* v. *Price*, 383 U. S. 787, 803 (1966). The Civil War had ended in April 1865. The First Session of the Thirty-ninth Congress met on December 4, 1865, some six months after the preceding Congress had sent to the States the Thirteenth Amendment and just two weeks before the Secretary of State certified the Amendment's ratification. On January 5, 1866, Senator Trumbull introduced the bill that would become the 1866 Act.[12]

The principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen.[13] Most of these laws embodied express racial classifications and although others, such as those penalizing vagrancy, were facially neutral, Congress plainly perceived all of them as consciously conceived methods of resurrecting the incidents of slavery.[14] Senator Trumbull summarized the paramount aims of his bill:

---

[12] Cong. Globe, 39th Cong., 1st Sess., 129 (1866).

[13] Discussion of the Black Codes occupied a central place in the congressional debates leading to enactment of the 1866 Act. See *id.*, at 588–589 (remarks of Rep. Donnelly); 602 (Sen. Lane); 603 (Sen. Wilson); 1123–1124 (Rep. Cook); 1118–1119 (Rep. Wilson); 1151–1152, 1153 (Rep. Thayer); 1160 (Rep. Windom); 1785 (Sen. Stewart); 1833–1835 (Rep. Lawrence); 1838–1839 (Rep. Clarke). The Codes are described in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 29–44 (1871).

> "Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the [Thirteenth] amendment." Cong. Globe, 39th Cong., 1st Sess., 474 (1866).

Senator Trumbull emphasized: "This bill has nothing to do with the political rights or *status* of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man." *Id.*, at 476 (emphasis in original).

Of course, this Court has found in the legislative history of the 1866 Act evidence that Congress sought to accomplish more than the destruction of state-imposed civil disabilities and discriminatory punishments. We have held that both § 1981 and § 1982 "prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein." *Jones* v. *Alfred H. Mayer Co.*, 392 U. S., at 436. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459–460 (1975); *Runyon* v. *McCrary*, 427 U. S., at 168. Nevertheless, the fact that the prohibitions of § 1981 encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination, whether public or private. Indeed, the relevant opinions are hostile to such an implication. Thus, although we held in *Jones*, *supra*, that § 1982 reaches private action, we explained that § 1 of the 1866 Act "was meant to prohibit *all racially motivated* deprivations of the rights enumerated in the statute." 392 U. S., at 426 (emphasis on "racially motivated" added). Similarly, in *Runyon* v. *McCrary*, *supra*, we stated that § 1981 would be violated "if a private offeror refuses to extend to a Negro, *solely because he is a Negro*, the same opportunity to enter into contracts as he extends to white offerees." 427 U. S., at 170–171.

---

[14] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., *supra*, at 1124 (Rep. Cook); 1151–1152 (Rep. Thayer); 1159 (Rep. Windom); 1785 (Sen. Stewart); 1839 (Rep. Clarke). See also *Memphis* v. *Greene*, 451 U. S. 100, 131–135 (1981) (WHITE, J., concurring in judgment).

The immediate evils with which the Thirty-ninth Congress was concerned simply did not include practices that were "neutral on their face, and even neutral in terms of intent," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971), but that had the incidental effect of disadvantaging blacks to a greater degree than whites. Congress instead acted to protect the freedmen from intentional discrimination by those whose object was "to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices." Cong. Globe, 39th Cong., 1st Sess., 1839 (1866) (Rep. Clarke). See *Memphis* v. *Greene*, 451 U. S. 100, 131–135 (1981) (WHITE, J., concurring in judgment). The supporters of the bill repeatedly emphasized that the legislation was designed to eradicate blatant deprivations of civil rights, clearly fashioned with the purpose of oppressing the former slaves. To infer that Congress sought to accomplish more than this would require stronger evidence in the legislative record than we have been able to discern.[15]

---

[15] We attach significance to the fact that throughout much of the congressional debates, S. B. 61, which became the 1866 Act, contained an opening declaration that "there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the

Our conclusion that § 1981 reaches only purposeful discrimination is supported by one final observation about its legislative history. As noted earlier, the origins of the law can be traced to both the Civil Rights Act of 1866 and the Enforcement Act of 1870. Both of these laws, in turn, were legislative cousins of the Fourteenth Amendment. The 1866 Act represented Congress' first attempt to ensure equal rights for the freedmen following the formal abolition of slavery effected by the Thirteenth Amendment. As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of "incorporat[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land." *Hurd* v. *Hodge*, 334 U. S., at 32.[16] The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close

---

United States *on account of race, color, or previous condition of slavery.*" See Cong. Globe, 39th Cong., 1st Sess., 474 (1866). This passage had occasioned controversy in both the Senate and the House because of the breadth of the phrase "civil rights and immunities." After the Senate had passed the bill and as debates in the House were drawing to a close, the bill's floor manager, Representative Wilson, introduced an amendment proposed by the House Judiciary Committee, of which he was also the Chairman. That amendment deleted the language quoted above and left the bill as it would read when ultimately enacted. See n. 10, *supra*. Representative Wilson explained that the broad language of the original bill could have been interpreted to encompass the right of suffrage and other political rights. "To obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section." Cong. Globe, 39th Cong., 1st Sess., *supra*, at 1367. See *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 292, n. 22 (1976). The deleted language, emphasized above, strongly suggests that Congress was primarily concerned with intentional discrimination. That the passage was removed in an effort to *narrow* the scope of the legislation sharply undercuts the view that the 1866 Act reflects broader concerns.

[16] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., *supra*, at 1294 (Rep. Wilson); *id.* at 2465 (Rep. Thayer).

connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself.[17]

With respect to the latter, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 264–265 (1977). "[E]ven if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272 (1979). See *Washington* v. *Davis*, 426 U. S. 229 (1976). The same Congress that proposed the Fourteenth Amendment also passed the Civil

---

[17] It is true that § 1981, because it is derived in part from the 1866 Act, has roots in the Thirteenth as well as the Fourteenth Amendment. Indeed, we relied on that heritage in holding that Congress could constitutionally enact § 1982, which is also traceable to the 1866 Act, without limiting its reach to "state action." See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 438 (1968). As we have already intimated, however, the fact that Congress acted in the shadow of the Thirteenth Amendment does not demonstrate that Congress sought to eradicate more than purposeful discrimination when it passed the 1866 Act. For example, Congress also enacted 42 U. S. C. § 1985(3) (1976 ed., Supp. IV) in part to implement the commands of the Thirteenth Amendment. See *Griffin* v. *Breckenridge*, 403 U. S. 88, 104–105 (1971). While holding that § 1985(3) does not require state action but also reaches private conspiracies, we have emphasized that a violation of the statute requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.*, at 102.

We need not decide whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose, or indeed whether it accomplished anything more than the abolition of slavery. See *Memphis* v. *Greene*, 451 U. S., at 125–126. We conclude only that the existence of that Amendment, and the fact that it authorized Congress to enact legislation abolishing the "badges and incidents of slavery," *Civil Rights Cases*, 109 U. S. 3, 20 (1883), do not evidence congressional intent to reach disparate effects in enacting § 1981.

Rights Act of 1866, and the ratification of that Amendment paved the way for the Enforcement Act of 1870. These measures were all products of the same milieu and were directed against the same evils. Although Congress might have charted a different course in enacting the predecessors to § 1981 than it did in proposing the Fourteenth Amendment, we have found no convincing evidence that it did so.

We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination.

III

The District Court held petitioners liable under § 1981 notwithstanding its finding that the plaintiffs had failed to prove intent to discriminate on the part of the employers and associations as a class. In light of our holding that § 1981 can be violated only by intentional discrimination, the District Court's judgment can stand only if liability under § 1981 can properly rest on some ground other than the discriminatory motivation of the petitioners themselves. Both the District Court and respondents have relied on such grounds, but we find them unconvincing.

A

The District Court reasoned that liability could be vicariously imposed upon the employers and associations, based upon the intentional discrimination practiced by Local 542 in its operation of the hiring hall. The court's theory was that petitioners had delegated to the "union hiring hall" the authority to select workers as "the agent for two principals—the union and the contractors, with their respective associations." 469 F. Supp., at 411. Since the hiring hall came into existence only through the agreement of petitioners, and since the exclusive hiring hall was the means by which "the intentional discrimination of the union was able to work its way broadly into the common workforce of operating engineers," *id.*, at 412, the court concluded that "[t]he acts of the union therefore justify imposition of responsibility upon those employers participating in the original delegation," *ibid.* The effect of this holding, as the court recognized, was to impose a "duty to see that discrimination does not take place in the selection of one's workforce," regardless of where the discrimination originates. *Ibid.*

As applied to the petitioner associations, the District Court's theory is flawed on its own terms. The doctrine of *respondeat superior*, as traditionally conceived and as understood by the District Court, see *id.*, at 411, enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant. See Restatement (Second) of Agency §§215–216, 219 (1958) (Restatement); W. Prosser, Law of Torts §§69–70 (4th ed. 1971) (Prosser); W. Seavey, Law of Agency §83 (1964) (Seavey). "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement §1. A master-servant relationship is a form of agency in which the master employs the servant as "an agent to perform service in his affairs" and "controls or has the right to control the physical conduct of the other in the performance of the service." *Id.*, §2. See 2 F. Harper & F. James, Law of Torts §26.6 (1956) (Harper & James). Local 542, in its operation of the hiring hall, simply performed no function as the agent or servant of the associations. The record demonstrates that the associations themselves do not hire operating engineers, and never have. Their primary purpose is to represent certain employers in contract negotiations with the Union. Even if the doctrine of *respondeat superior* were broadly applicable to suits based on §1981, therefore, it would not support the imposition of liability on a defendant based on the acts of a party with whom it had no agency or employment relationship.[18]

---

[18] In this case, the associations were held liable because they negotiated an agreement, fair on its face, which was later implemented by another

We have similar difficulty in accepting the application of traditional *respondeat superior* doctrine to the class of contractor employers. In the run of cases, the relationship between an employer and the union that represents its employees simply cannot be accurately characterized as one between principal and agent or master and servant. Indeed, such a conception is alien to the fundamental assumptions upon which the federal labor laws are structured.

At the core of agency is a "fiduciary relation" arising from the "consent by one person to another that the other shall act on his behalf and subject to his control." Restatement § 1. Equally central to the master-servant relation is the master's control over or right to control the physical activities of the servant. See *id.*, § 220; 2 Harper & James § 26.3; Seavey § 84, p. 142. See also *Logue* v. *United States*, 412 U. S. 521, 527 (1973). The District Court found that the requirement of control was satisfied because "the employers retained power to oppose the union discrimination." 469 F. Supp., at 411, n. 61. However, the "power to oppose" the Union, even when the opposition is grounded in the terms of the collective-bargaining agreement, is not tantamount to a "right to control" the Union. See *Lummus Co.* v. *NLRB*, 119 U. S. App. D. C. 229, 236, 339 F. 2d 728, 735 (1964).[19]

---

party in a manner that was not only discriminatory but in violation of the agreement itself *and* in a manner of which the associations were neither aware nor had reason to be aware. Since the associations' only role was as agent for employers whose hiring would actually be governed by the agreement, the District Court's theory presumably would also permit the imposition of liability on the attorneys who actually conducted the contract negotiations. We are unaware of any authority supporting such an extended application of *respondeat superior*.

[19] According to respondents, the District Court's conclusion that petitioners retained the power to control the hiring hall was a finding of fact that cannot be set aside unless clearly erroneous. We disagree. The District Court found that petitioners had the "power to oppose" the Union, a conclusion we do not question. Whether the power to oppose the Union is equivalent to a right of control sufficient to invoke the doctrine of *respondeat superior* is, however, a legal question to which we must devote our independent judgment.

Indeed, a rule equating the two would convert every contractual relationship into an agency relationship, a result clearly unsupported by the common-law doctrines on which the District Court relied.

The District Court's assumptions about the relation between the Union and the class of employers with whom it has contracted also runs counter to the premises on which the federal labor laws have been constructed. While authorizing collective bargaining and providing means of enforcing the resultant contracts, the National Labor Relations Act expressly prohibits employers from compromising the independence of labor unions. See 49 Stat. 452, as amended, 29 U. S. C. § 158(a); 61 Stat. 157, as amended, 29 U. S. C. § 186. The entire process of collective bargaining is structured and regulated on the assumption that "[t]he parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488 (1960). See *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967). We have no reason to doubt the validity of that assumption in the instant case.

Respondents also suggest that petitioners can be held vicariously liable for the discriminatory conduct of the JATC. They argue that the JATC is properly viewed as an agent of both Local 542 and the associations, emphasizing that half of the trustees charged with administering the JATC are appointed by the associations and that the JATC is wholly funded by mandatory contributions from the employers. We note initially that the District Court premised petitioners' liability not on the actions of the JATC, but on the discriminatory conduct of the Union. See 469 F. Supp., at 411–413. The record, therefore, contains no findings regarding the relationship between the JATC and petitioners, beyond those noted above, that might support application of *respondeat superior*.

The facts emphasized by respondents, standing alone, are inadequate. That the employers fund the activities of the JATC does not render the JATC the employers' servant or agent any more than an independent contractor is rendered an agent simply because he is compensated by the principal for his services. The employers must also enjoy a right to control the activities of the JATC, and there is no record basis for believing that to be the case. Neither is a right of control inferable merely from the power of the associations to appoint half of the JATC's trustees. It is entirely possible that the trustees, once appointed, owe a fiduciary duty to the JATC and the apprentices enrolled in its programs, rather than to the entities that appointed them. Cf. *NLRB* v. *Amax Coal Co.*, 453 U. S. 322 (1981). On the assumption that *respondeat superior* applies to suits based on § 1981, there is no basis for holding either the employers or the associations liable under that doctrine without evidence that an agency relationship existed at the time the JATC committed the acts on which its own liability was premised.

B

The District Court also justified its result by concluding that § 1981 imposes a "nondelegable duty" on petitioners "to see that discrimination does not take place in the selection of [their] workforce." 469 F. Supp., at 412.[20] The concept of a nondelegable duty imposes upon the principal not merely an obligation to exercise care in his own activities, but to answer for the well-being of those persons to whom the duty runs. See Restatement § 214. The duty is not discharged by using care in delegating it to an independent contractor. Consequently, the doctrine creates an exception to the common-law rule that a principal normally will not be liable for the tortious conduct of an independent contractor. See 2 Harper & James §26.11, pp. 1405–1408; Prosser §70, p. 467, §71, p. 470. So understood, a nondelegable duty is an affirmative obligation to ensure the protection of the person to whom the duty runs.

---

[20] The court relied on Restatement § 214:

"A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty."

In a sense, to characterize such a duty as "nondelegable" is merely to restate the duty. Thus, in this litigation the question is not whether the employers and associations are free to delegate their duty to abide by §1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is *what* duty does §1981 impose. More precisely, does §1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to ensure that blacks enjoy such a right? The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United States." We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. It did not intend to make them the guarantors of the workers' rights as against third parties who would infringe them. Cf. *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 577–578 (1978) (Title VII); *Rizzo* v. *Goode*, 423 U. S. 362, 376–377 (1976) (42 U. S. C. §1983).

Our earlier holding that §1981 reaches only intentional discrimination virtually compels this conclusion. It would be anomalous to hold that §1981 could be violated only by intentional discrimination and then to find this requirement satisfied by proof that the individual plaintiffs did not enjoy "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" and that the defendants merely failed to ensure that the plaintiffs enjoyed employment opportunities equivalent to that of whites. Such a result would be particularly inappropriate in the case of the associations, who are not engaged in the construction business, do not employ operating engineers, and consequently did not delegate to the Union any hiring functions which they otherwise would have performed themselves. Neither the District Court nor respondents identify anything in the language or legislative history of the statute to support a contrary conclusion.[21]

IV

In a separate portion of their brief, respondents urge several independent bases for the issuance of an injunction against the petitioners and the allocation to them of a portion of the costs of the remedial decree. Respondents first assert that the court had inherent equitable power to allocate remedial costs among all the named defendants. They also rely on the All Writs Act, 28 U. S. C. § 1651(a), as an independent basis for the injunctive portions of the District Court's order running against petitioners. We shall deal with these contentions in turn.

---

[21] Respondents also contend that petitioners can be held liable on the theory that the hiring hall was a "joint enterprise" involving petitioners as well as the Union. They point to language in the District Court's opinion holding that "the union hiring hall was the agent for two principals—the union and the contractors, with their respective associations." 469 F. Supp., at 411. Even this theory, however, requires, among other things, the existence of a mutual right of control as between the members of the enterprise. See Restatement § 491; 2 Harper & James § 26.13, p. 1414. For reasons we have already stated, there is no record basis for finding that petitioners had a right to control Local 542 in its administration of the hiring hall. We also doubt the validity of the assumption that the hiring hall is a separate entity, except perhaps as a physical structure. The District Court did not find, and respondents do not assert, that the hiring hall has a separate juridical existence. Indeed, in discussing the operation of the hiring hall, the District Court made clear that it was imposing liability on the basis of *the Union's* conduct. As used in the court's opinion, the phrase "hiring hall" appears to be no more than a shorthand reference for the referral process administered on a day-to-day basis by the Union.

The District Court in an opinion issued after judgment set forth the basis for its holding that "defendants held injunctively liable solely under a theory of vicarious responsibility are nevertheless liable for 'a share' of the costs under Rule 54(d)." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 507 F. Supp. 1146, 1152 (1980). The District Court framed the inquiry before it as whether a party held vicariously liable to an injunction, but not for damages, might nonetheless have a proportionate share of the costs assessed against it. While this may have been an entirely appropriate frame of reference for the District Court, following its holding that petitioners were vicariously liable and therefore subject to an injunction, it is obviously not the proper frame of reference for our discussion. For the reasons previously stated, we have concluded that petitioners were not properly subject to an injunction on any of the theories set forth by the District Court. The issue before us, therefore, is whether a party not subject to liability for violating the law may nonetheless be assessed a proportionate share of the costs of implementing a decree to assure nondiscriminatory practices on the part of another party which *was* properly enjoined.

We find respondent's arguments based on the traditional equitable authority of courts to be unpersuasive. In *Milliken* v. *Bradley*, 433 U. S. 267 (1977), upon which respondents rely, and which we believe to be the case most closely in point, we expressly noted that the state petitioners had been found guilty of creating at least a portion of the constitutional violation which the order challenged in that case was designed to remedy. *Id.*, at 281–282, 289. Thus our holding there was consistent with our opinion in *Hills* v. *Gautreaux*, 425 U. S. 284 (1976), where we explained the relationship between our holding in the first *Milliken* case, *Milliken* v. *Bradley*, 418 U. S. 717 (1974), and our opinion in *Swann* v.

Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971). We read these earlier decisions as recognizing "fundamental limitations on the remedial powers of the federal courts." 425 U. S., at 293. Those powers could be exercised only on the basis of a violation of the law and could extend no farther than required by the nature and the extent of that violation. *Id.*, at 293–294. This principle, we held, was not one limited to school desegregation cases, but was instead "premised on a controlling principle governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context." *Id.*, at 294, n. 11.

We think that the principle enunciated in these cases, transposed to the instant factual situation, offers no support for the imposition of injunctive relief against a party found not to have violated any substantive right of respondents. This is not to say that defendants in the position of petitioners might not, upon an appropriate evidentiary showing, be retained in the lawsuit and even subjected to such minor and ancillary provisions of an injunctive order as the District Court might find necessary to grant complete relief to respondents from the discrimination they suffered at the hands of the Union. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 399–400 (1982). But that sort of minor and ancillary relief is not the same, and cannot be the same, as that awarded against a party found to have infringed the statutory rights of persons in the position of respondents.

The order of the District Court, insofar as it runs against petitioners, cannot be regarded as "minor" or "ancillary" in any proper sense of those terms. First, it imposes considerable burdens on the employers and associations. It directs the employers to meet detailed "minority utilization goals" in their hiring, keyed to the number of hours worked. App. to Pet. for Cert. in No. 81–280, p. 236. If they are unable to do so through referrals from Local 542, they are required to hire minority operating engineers who are not affiliated with the

Union. *Ibid.* If the goals are still not satisfied, the employers must recruit and hire unskilled minority workers from the community and provide on-the-job training. *Id.*, at 236–237. The employers are also obligated to make quarterly reports detailing the extent of their compliance with these directives. *Id.*, at 241–242. Finally, the District Court imposed on the employers and the associations a share of the financial cost incidental to enforcement of the remedial decree as a whole. *Id.*, at 252–254. See 507 F. Supp. 1146 (1980). According to petitioners, the expense of the decree in the first year of its 5-year life exceeded $200,000. See Brief for Petitioner in No. 81–280, p. 45, n. 77.

Absent a supportable finding of liability, we see no basis for requiring the employers or the associations to aid either in paying for the cost of the remedial program as a whole or in establishing and administering the training program. Nor is the imposition of minority hiring quotas directly upon petitioners the sort of remedy that may be imposed without regard to a finding of liability. If the Union and the JATC comply with the decree by training and referring minority workers, we see no reason to assume, absent supporting evidence, that the employers will not hire the minority workers referred pursuant to the collective-bargaining agreement, and employ them at wages and hours commensurate with those of nonminority workers. If experience proves otherwise, the District Court will then have more than sufficient grounds for including the employers within the scope of the remedial decree.

To the extent that the remedy properly imposed upon the Union and the JATC requires any adjustment in the collective-bargaining contract between petitioners and the Union, it is entirely appropriate for the District Court to fashion its injunctive remedy to so provide, and to have that remedy run against petitioners as well as the Union and the JATC. But the injunctive decree entered by the District Court as presently drawn treats petitioners as if they had been properly found liable for the Union's discrimination. A decree containing such provisions, we hold, is beyond the traditional equitable limitations upon the authority of a federal court to formulate such decrees.

Nor does the All Writs Act, 28 U. S. C. § 1651(a), support the extensive liability imposed upon petitioners by the District Court. The District Court did not rely upon this Act, and we think it completely wide of the mark in justifying the relief granted by the District Court. That Act was most recently considered by this Court in *United States* v. *New York Telephone Co.*, 434 U. S. 159 (1977), where we said: "This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained . . . ." *Id.*, at 172. In *New York Telephone*, we held that the All Writs Act was available to require a third party to assist in the carrying out of a District Court order pertaining to the installation of pen registers, and in doing so we noted that "[t]he order provided that the Company be fully reimbursed at prevailing rates, and compliance with it required minimal effort on the part of the Company and no disruption to its operations." *Id.*, at 175.

An examination of our cases which have relied on the All Writs Act convinces us that respondents are simply barking up the wrong tree when they seek to support the injunctive order of the District Court against petitioners on the basis of the provisions of that Act. There was no need for the District Court to treat petitioners as strangers to this lawsuit, and therefore to rely upon some extraordinary form of process or writ to bring them before the court. Petitioners had been named as defendants by respondents in their complaint, and they litigated the injunctive liability phase of the action before the District Court. Petitioners were parties to the action in every sense of the word, and subject to the jurisdiction of the District Court both as to the imposition of liability and as to the framing of a remedial decree. The difficulty faced by respondents in supporting the decree of the District Court insofar as it grants affirmative relief and requires payment toward the cost of implementing the decree is not that petitioners would otherwise be strangers to the action. The difficulty lies instead with the fact that on the record before the District Court the petitioners could not properly be held liable to any sort of injunctive relief based on their own conduct.

Thus insofar as respondents' arguments for the imposition of remedial obligations upon petitioners rests upon the assumption that petitioners were properly found liable for the violation of respondents' rights to be free from discrimination, that assumption can no longer stand in view of the conclusions previously set forth in this opinion. Insofar as respondents' assertions are based on some authority of the District Court to impose the sort of obligations which it did upon petitioners even though petitioners could not be held liable on the record before the District Court, we hold that such obligations can be imposed neither under traditional equitable authority of the District Court nor under the All Writs Act.[22]

---

[22] Petitioners have raised several objections to the District Court's certification of a defendant class. In light of our disposition, however, we find it unnecessary to reach these issues. It is evident from the District Court's opinion that certification of the defendant class was premised on theories of liability that made individualized questions irrelevant. See n. 5, *supra*. We have now rejected those theories, and we assume that the District Court will reconsider the issue of class certification in the event of a new trial to determine liability.

Petitioners have also questioned the standing of respondent Commonwealth of Pennsylvania to act either on its own behalf or as *parens patriae* in this litigation. We need not reach this issue either. Petitioners have not challenged the standing of the other plaintiffs and, therefore, even if Pennsylvania lacks standing, the District Court possessed Art. III jurisdiction to entertain those common issues presented by all plaintiffs. See *Watt* v. *Energy Action Educational Foundation*, 454 U. S. 151, 160 (1981); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, concurring.

I concur in the Court's opinion today holding that a cause of action based on 42 U. S. C. § 1981 requires proof of intent to discriminate, that the employers cannot be held vicariously liable for the discrimination practiced by Local 542, and that § 1981 does not impose a "nondelegable duty" on the employers to insure that there is no discrimination in the Union's selection of the work force. I write separately, however, in order to state expressly one of the options open to the District Court on remand, and to elaborate on the Court's comments regarding the scope of the federal courts' equitable power to afford full relief.

I

In determining that the petitioners cannot be held vicariously liable for the discriminatory conduct of the JATC, the Court is careful to note that its holding is based on the failure of the trial court to make "findings regarding the relationship between the JATC and petitioners . . . that might support application of *respondeat superior*." *Ante*, at 394.[1] In particular, because the record contains no findings regarding

---

264, n. 9 (1977). Petitioners note that Pennsylvania has sought attorney's fees in its own right, but our judgment has removed the basis for such an award against petitioners until such time as Pennsylvania can again assert status as a prevailing party. Until Pennsylvania obtains relief different from that sought by plaintiffs whose standing has not been questioned, we decline to address the Commonwealth's standing.

[1] The only facts offered by the respondents supporting application of *respondeat superior* are that half of the trustees administering the JATC are appointed by the employer associations, and that the JATC is funded entirely by mandatory employer contributions.

whether the employers maintain some control over the activities of the JATC, either through the employer-appointed trustees or through other means, the doctrine of *respondeat superior* is simply inapplicable.

I would briefly note the limits of the Court's holding. Once this case has been remanded to the District Court, nothing in the Court's opinion prevents the respondents from litigating the question of the employers' liability under § 1981 by attempting to prove the traditional elements of *respondeat superior.*

II

Regarding the scope of a federal court's equitable powers to afford full relief, I agree with the Court's holding that "a party not subject to liability for violating the law [may not] be assessed a proportionate share of the costs of implementing a decree to assure nondiscriminatory practices on the part of another party which *was* properly enjoined." *Ante,* at 398.[2] I also agree with the Court's ancillary holding that the District Court may not require quarterly reports from the employers detailing their compliance with the court's ill-founded injunction. Of course, since the employers are not liable for general injunctive relief, such reports are unnecessary.

Under the appropriate circumstances, however, I believe other reports properly could be required of the employers, for example, to aid the court by charting the changes resulting from the injunction imposed on the Union and the JATC. Quite recently, in *Zipes* v. *Trans World Airlines, Inc.,* 455 U. S. 385 (1982), this Court held that § 706(g) of Title VII of the Civil Rights Act of 1964 authorizes a federal court to order retroactive seniority relief over the objections of a union that was not guilty of discrimination. The Court stated:

---

[2] In the present cases, the District Court ordered the three employer associations to pay 10% of the costs of remedial relief, and the employer, Glasgow, to pay 5%. Because the cost of relief to date has been approximately $200,000, the petitioners' share of the cost has been $70,000.

> "*Teamsters* v. *United States*, 431 U. S. 324 (1977), . . . makes it clear that once there has been a finding of discrimination by the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated. In *Teamsters*, the parties agreed to a decree which provided that the District Court would decide 'whether any discriminatees should be awarded additional equitable relief such as retroactive seniority.' *Id.*, at 331, n. 4. Although we held that the union had not violated Title VII by agreeing to and maintaining the seniority system, we nonetheless directed the union to remain in the litigation as a defendant so that full relief could be awarded the victims of the employer's post-Act discrimination. *Id.*, at 356, n. 43." *Id.*, at 400.[3]

As the Court acknowledges today, it is entirely possible that full relief cannot be granted without subjecting the petitioners to some incidental or ancillary provisions of the court's injunctive order. It is thus conceivable, for example, that quarterly reports providing employment statistics necessary for the court to ascertain whether its injunctive decree is being properly implemented could be ordered under the court's equitable powers to effectuate its decree.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

As I noted in my separate opinion in *Runyon* v. *McCrary*, 427 U. S. 160, 189, the Congress that enacted § 1 of the Civil

---

[3] In support of this statement, the Court in *Teamsters* cited Rule 19(a)(1) of the Federal Rules of Civil Procedure, which requires a district court to join a person as a party if "in his absence complete relief cannot be accorded among those already parties."

Rights Act of 1866 "intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence." Any violation of that guarantee—whether deliberate, negligent, or purely accidental—would, in my opinion, violate 42 U. S. C. § 1981. The statute itself contains no requirement that an intent to discriminate must be proved.

The Court has broadened the coverage of § 1981 far beyond the scope actually intended by its authors; in essence, the Court has converted a statutory guarantee of equal rights into a grant of equal opportunities. See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409; *Runyon* v. *McCrary*, *supra.* Whether or not those decisions faithfully reflect the intent of Congress, the enlarged coverage of the statute "is now an important part of the fabric of our law." *Runyon*, *supra*, at 190 (STEVENS, J., concurring).

Since I do not believe Congress intended § 1981 to have any application at all in the area of employment discrimination generally covered by Title VII of the Civil Rights Act of 1964, an analysis of the motives and intent of the Reconstruction Congress cannot be expected to tell us whether proof of intentional discrimination should be required in the judicially created portion of the statute's coverage. Since Congress required no such proof in the statute it actually enacted, a logician would be comfortable in concluding that no such proof should ever be required. Nevertheless, since that requirement tends to define the entire coverage of § 1981 in a way that better reflects the basic intent of Congress than would a contrary holding, I concur in the conclusion reached by the Court in Part II of its opinion insofar as it relates to the statutory protection of equal opportunity but, perhaps illogically, would reach a different conclusion in a case challenging a denial of a citizen's civil rights.

Accordingly, I join the Court's judgment and Parts III and IV of its opinion.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Today the Court reaches out and decides that 42 U. S. C. § 1981 requires proof of an intent to discriminate—an issue that is not at all necessary to the disposition of these cases. Because I find no support for the majority's resolution of this issue, and because I disagree with its disposition of these cases even if proof of intent should ordinarily be required, I respectfully dissent.

I

The question whether intent generally should be required in § 1981 actions is at most tangentially related to these cases. There was unquestionably intentional discrimination on the part of both the union (Local 542) and the Joint Apprenticeship and Training Committee (JATC), a body composed of officials from the union and the petitioner contracting associations, which jointly administered the apprenticeship and training program. As a result, the only question that the Court need address today is whether limited injunctive liability may be vicariously imposed upon an employer when the person or entity to whom it delegates a large portion of its hiring decisions intentionally discriminates on the basis of race. However, because the majority has chosen to reach first the more general question whether proof of intent is a prerequisite to recovery in a § 1981 action, I likewise will address this issue first.

Section 1981 provides in unqualified terms:

> "All persons within the jurisdiction of the United States *shall have the same right* in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U. S. C. § 1981.

The plain language does not contain or suggest an intent requirement. A violation of § 1981 is not expressly conditioned on the motivation or intent of any person. The language focuses on the effects of discrimination on the protected class, and not on the intent of the person engaging in discriminatory conduct. Nothing in the statutory language implies that a right denied because of sheer insensitivity, or a pattern of conduct that disproportionately burdens the protected class of persons, is entitled to any less protection than one denied because of racial animus.

The Court attaches no significance to the broad and unqualified language of § 1981. Furthermore, the majority finds no support for its conclusion that intent should be required in the legislative history to § 1 of the 1866 Act, the precursor to § 1981. Instead, in the face of this unqualified language and the broad remedial purpose § 1981 was intended to serve, the majority assumes that Congress intended to restrict the scope of the statute to those situations in which racial animus can be proved on the ground that the legislative history contains no "convincing evidence" to the contrary. *Ante*, at 391. In my view, this approach to statutory construction is not only unsound, it is also contrary to our prior decisions, which have consistently given § 1981 as broad an interpretation as its language permits. See, *e. g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273 (1976); *Runyon* v. *McCrary*, 427 U. S. 160 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975); *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U. S. 431 (1973); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968).

The fallacy in the Court's approach is that, in construing § 1981 and its legislative history, the Court virtually ignores Congress' broad remedial purposes and our paramount national policy of eradicating racial discrimination and its pernicious effects. When viewed in this light, it is clear that proof of intentional discrimination should not be required in order to find a violation of § 1981.

Although the Thirty-ninth Congress that passed the Civil Rights Act of 1866 did not specifically address the question whether intent should be required, the conclusion is inescapable that the congressional leadership intended to effectuate "the *result* of a change from a centuries old social system based on involuntary labor, with all the notions of racial unsuitability for the performance of anything but menial labor under close supervision, to the free labor system." *Croker* v. *Boeing Co.*, 662 F. 2d 975, 1006 (CA3 1981) (Gibbons, J., with whom Higginbotham and Sloviter, JJ., joined, dissenting in part) (emphasis in original). When this Congress convened, the Thirteenth Amendment had been ratified, abolishing slavery as a legal status. However, it was clear that in reality, Negroes were hardly accorded the employment and other opportunities accorded white persons generally. Thus, this Congress undertook to provide *in fact* the rights and privileges that were available to Negroes in theory. See generally J. tenBroek, The Antislavery Origins of the Fourteenth Amendment 156–180 (1951) (discussing the intent of the Thirty-ninth Congress to ensure to Negroes the *practical* freedom and equality which was already present at law, to reach private, not merely governmental conduct, and to provide affirmative obligations on the government to protect Negroes from unequal treatment). Four separate but related measures were proposed in an effort to accomplish this purpose.[1]

In this general climate, the 1866 Civil Rights Act was not an isolated technical statute dealing with only a narrow subject. Instead, it was an integral part of a broad congressional scheme intended to work a major revolution in the prevailing social order.[2] It is inconceivable that the Congress which enacted this statute would permit this purpose to be thwarted by excluding from the statute private action that concededly creates serious obstacles to the pursuit of job opportunities by Negroes solely because the aggrieved persons could not prove that the actors deliberately intended such a result. Even less conceivable is the notion, embraced by the Court's opinion today, that this Congress intended to absolve employers from even injunctive liability imposed as a result of intentional discrimination practiced by the persons to whom they had delegated their authority to hire employees. See *infra*, at 414–418.

---

[1] These measures included the Civil Rights Act of 1866, passed over President Johnson's veto; the Freedman's Bureau bill, which would have created a federal agency to ensure that a free labor system in which Negroes had equal participation would *in fact* be accomplished, and which commanded a clear majority in Congress, but failed to pass over a Presidential veto; a constitutional amendment sponsored by Representative Bingham but not recommended; and the Fourteenth Amendment.

The legislative history demonstrates that the Thirty-ninth Congress intended not merely to provide a remedy for preexisting rights, but to eradicate the "badges of slavery" that remained after the Civil War and the enactment of the Thirteenth Amendment. Congress was acutely aware of the difficulties that federal officials had encountered in effectuating the change from the system of slavery to a system of free labor even though the legal and constitutional groundwork for this change had already been laid. In the report that formed the working paper for the Joint Committee on Reconstruction and was of central importance to the deliberations of the Thirty-ninth Congress, General Schurz noted:

---

[2] As the majority recognizes, *ante*, at 386–387, one of the principal changes Congress hoped to achieve was the elimination of the infamous Black Codes. These included state laws regulating the terms and conditions of employment. In many States, these oppressive laws were facially neutral, literally applying to all laborers without regard to race. The laws prohibited such conduct as refusing to perform work and disobeying an employer, or inducing an employee away from his employer, and many provided for forfeiture of wages if the employee did not fulfill the terms of his employment contract. Other Codes included vagrancy laws, which were vague and broad enough to encompass virtually all Negro adults, and many were facially neutral, applying to white persons as well as to Negroes. See *Croker* v. *Boeing Co.*, 662 F. 2d 975, 1004, n. 5 (CA3 1981) (Gibbons, J., dissenting in part) (citing E. McPherson, Political History of the United States of America During the Period of Reconstruction 30–44 (1871)). The Black Codes were constantly discussed during the debates over the Civil Rights Act of 1866, and Congress clearly intended that the Act would eliminate even those Codes which were facially neutral. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 39–41, 118–125 (1865); *id.*, at 1151–1160, 1838–1839 (1866). See also *University of California Regents* v. *Bakke*, 438 U. S. 265, 390–391 (1978) (separate opinion of MARSHALL, J.).

> "That the result of the free labor experiment made under circumstances so extremely unfavorable should at once be a perfect success, no reasonable person would expect. Nevertheless, a large majority of the southern men with whom I came into contact announced their opinions with so positive an assurance as to produce the impression that their minds were fully made up. In at least nineteen cases of twenty the reply I received to my inquiry about their views on the new system was uniformly this: 'You cannot make the negro work without physical compulsion.' I heard this hundreds of times, heard it wherever I went, heard it in nearly the same words from so many different persons, that at last I came to the conclusion that this is the prevailing sentiment among the southern people. There are exceptions to the rule, but, as far as my information extends, far from enough to affect the rule. In the accompanying documents you will find an abundance of proof in support of this statement. There is hardly a paper relative to the negro question annexed to this report which does not, in some direct or indirect way, corroborate it." S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865), reprinted in The Reconstruction Amendments' Debates 88 (Virginia Comm'n on Constitutional Government, 1967).

Fully aware of this prevailing attitude, the leaders of Congress set about to enact legislation that would ensure to Negroes the opportunity to participate equally in the free labor system by providing an instrument by which they could strike down barriers to their participation, whether those barriers were erected with the conscious intent to exclude or with callous indifference to exclusionary effects. Congress knew that this attitude could manifest itself in a number of different ways and intended to protect Negro workers against not only flagrant, intentional discrimination, but also against more subtle forms of discrimination which might successfully camouflage the intent to oppress through facially neutral policies. Congressional awareness of the potential role that facially neutral measures might play in impeding the ability of Negroes to enjoy equal job opportunities is also reflected in the working paper which formed the basis for the 1866 Act. Addressing this problem, General Schurz stated:

> "What particular shape the reactionary movement will assume it is at present unnecessary to inquire. There are a hundred ways of framing apprenticeship, vagrancy, or contract laws, which will serve the purpose . . . ." *Id.*, at 92.

Unfortunately, this awareness seems utterly lacking in the Court's opinion today. In order to hold that § 1981 requires a showing of intent, the majority must assume that the rights guaranteed under § 1981—to make and enforce contracts on the same basis as white persons—can be adequately protected by limiting the statute to cases where the aggrieved person can prove intentional discrimination. In taking this extraordinarily naive view, the Court shuts its eyes to reality, ignoring the manner in which racial discrimination most often infects our society. Today, although flagrant examples of intentional discrimination still exist, discrimination more often occurs "on a more sophisticated and subtle level," the effects of which are often as cruel and "devastating as the most crude form of discrimination." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 337 (ED Pa. 1978) (Higginbotham, Circuit Judge, sitting by designation).[3] I think that Judge Higginbotham most accurately recognized this problem when he noted that "[t]he facts of the instant case . . . demonstrate the complexity and subtlety of the interrelationship of race, collective bargaining, craft unions, the employment process and that ultimate goal—real jobs." *Ibid.* He further noted that "[a]t the critical level of viable jobs and equal opportunities, there were intentional and persistent efforts to exclude and discourage most of the minorities who, but for their race, would have been considered for entry into the union and for the more lucrative jobs." *Ibid.*

---

[3] When discussing the scope of the Fifteenth Amendment in 1939, Justice Frankfurter was sensitive to the subtle forms that racial discrimination

Racial discrimination in all areas, and particularly in the areas of education and employment, is a devastating and reprehensible policy that must be vigilantly pursued and eliminated from our society:

> "Racial discrimination can be the most virulent of strains that infect a society, and the illness in any society so infected can be quantified. Exposure to embarrassment, humiliation, and the denial of basic respect can and does cause psychological and physiological trauma to its victims. This disease must be recognized and vigorously eliminated wherever it occurs. But racial discrimination takes its most malevolent form when it occurs in employment, for prejudice here not only has an immediate economic effect, it has a fulminating integrant that perpetuates the pestilences of degraded housing, unsatisfactory neighborhood amenities, and unequal education." *Croker* v. *Boeing Co.*, 662 F. 2d, at 1002 (Aldisert, J., with whom Higginbotham, J., joined, dissenting in part).

The purposes behind § 1981, and the profound national policy of blotting out all vestiges of racial discrimination, are no less frustrated when equal opportunities are denied through clev-

---

often takes. Writing for the Court in *Lane* v. *Wilson*, 307 U. S. 268, 275, he stated: "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Unfortunately, the Court no longer seems sensitive to this reality.

erly masked or merely insensitive practices, where proof of actual intent is nearly impossible to obtain, than when instances of intentional discrimination escape unremedied. For this reason, I cannot accept the Court's glib and unrealistic view that requiring proof of intent in § 1981 actions does not frustrate that statute's purpose of protecting against the devastating effects of racial discrimination in employment.

II

Even if I agreed with the Court that intent must be proved in a § 1981 action, I could not agree with its conclusion that the petitioner contracting associations should be immunized, even from injunctive liability, for the intentional discrimination practiced by the union hall to which they delegated a major portion of their hiring decisions. Under § 1981, minorities have an unqualified right to enter into employment contracts on the same basis as white persons. It is undisputed that in these cases, the respondent class was denied this right through intentional discrimination. The fact that the associations chose to delegate a large part of the hiring process to the local union hiring hall, which then engaged in intentional discrimination, does not alter the fact that respondents were denied the right to enter into employment contracts with the associations on the same basis as white persons.

At the very least, § 1981 imposes on employers the obligation to make employment decisions free from racial considerations. The hiring decisions made by the contracting associations in these cases were fraught with racial discrimination. Solely because of their race, hundreds of minority operating engineers were totally excluded from the industry and could not enter into employment contracts with any employer. Those minorities allowed into the industry suffered discrimination in referrals, and thus they too were denied the same right as white persons to contract with the contracting associations. Not one of the petitioner contracting associations has ever claimed, nor could they, that minorities had the same right as white operating engineers to contract for employment.

Instead, the contracting associations attempt to hide behind the veil of ignorance, shifting their responsibility under § 1981 to the very entity which they chose to assist them in making hiring decisions.[4] The suggestion that an employer's responsibility under § 1981 depends upon its own choice of a hiring agent finds no support in the statute, nor does any other source of law authorize the circumvention of § 1981 that the contracting associations seek here. Their obligation to make employment contracts free from racial discrimination is a nondelegable one—it does not disappear when, as is often the case, the actual employer designates a particular agent to assist in the hiring process. In my view, the fact that the discriminating entity here is a union hiring hall, and not a person or corporation which has a traditional agent-principal relationship with the employer, does not alter this analysis. Cf. *Morrison-Knudsen Co.* v. *NLRB*, 275 F. 2d 914 (CA2 1960) (per Swan, J.) (employer cannot escape liability for discrimination against nonunion members by the union hiring hall to which it turns over the task of supplying men for employment), cert. denied, 366 U. S. 909 (1961).

---

[4] Although the District Court held that respondents had not proved that the contracting associations as a class had actual knowledge or had specifically approved of the intentional discrimination, it hardly found them totally blameless in this regard, and it found that the petitioner associations in particular were not innocent. One part of the proof of intentional discrimination by the hiring hall was the fact that Local 542 had intentionally overstated its percentage of minority members to the Federal Government in order to receive federal funds while maintaining an extraordinarily low actual minority percentage. With respect to the petitioner contracting associations, the District Court found:

"Any argument that, because the union alone had primary access to the membership data, the [petitioner] contracting associations . . . were not at least reckless participants in this scheme, I find to be devoid of merit and patently incredible. . . . The prospect of deriving . . . an immediate and substantial financial benefit from the federal coffers allowed them to become willing parties to the scheme by capriciously certifying 'facts' in anticipation of the government's reliance on them: Having sought to enrich their members with substantial profits, it is now too late to cry innocence and cast the blame elsewhere. These were no innocent prognosticators who were misled by the union's scheme to give inaccurate information." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 345 (ED Pa. 1978).

The District Court further found:

"The fact is that the vast majority of individual contractors *never hired* a minority operating engineer; that the [petitioner associations] signed a statement, relevant to federal approval of the 'Affirmative Action Program' . . . , grossly exaggerating minority union membership; and that the gross disparity between the percentage of the minority representation in the labor pool and minority representation in the union along with a gross disparity in hours and wages of minorities as against the minority labor pool percentage is a matter of such broad scope that some or all of the contractors and associations might have had knowledge of it." *Id.*, at 401 (emphasis added).

The majority does not really analyze the question whether petitioners should be held injunctively liable because § 1981 imposes upon them a nondelegable duty. Instead the majority argues that, because it has held that § 1981 is intended only to reach intentional discrimination, the statute cannot make employers "guarantors of the workers' rights as against third parties who would infringe them." *Ante*, at 396. This argument does not withstand analysis. The majority does not assert that employers may escape liability under § 1981 by delegating their hiring decisions to a third-party agent. Indeed, in light of the importance attached to the rights § 1981 is intended to safeguard, the duty to abide by this statute must be nondelegable, as the majority apparently recognizes. *Ante*, at 396. Instead, the majority argues that because § 1981 imposes only the duty to refrain from intentional discrimination in hiring, it somehow automatically follows that this duty could not have been violated in this case. However, it was precisely this duty that was violated here. The District Court found, and this Court does not disagree, that the entity to whom the petitioner associations effectively delegated their hiring decisions *intentionally discriminated* against the respondent class on the basis of race in making these decisions. Even under the Court's own narrow view of the scope of the duty imposed by § 1981, then, the duty was unquestionably violated in these cases.

The majority obfuscates the issue by suggesting that the District Court imposed upon the contracting associations an obligation to seek out and eliminate discrimination by unrelated third parties wherever it may occur. In reality, the District Court did nothing more than impose limited injunctive liability upon the associations for violating their nondelegable duty under § 1981 when the union hiring hall, which effectively made hiring decisions for the associations, engaged in intentional discrimination on the basis of race in making these decisions.

By immunizing the employer from the injunctive relief necessary to remedy the intentional discrimination practiced by those through whom the employer makes its hiring decisions, the Court removes the person most necessary to accord full relief—the entity with whom the aggrieved persons will ultimately make a contract. I believe that the District Court appropriately rejected the petitioners' argument when it explained: "With intensity some employers urge that they agreed to the exclusive hiring hall system solely as a matter of economic survival at the end of a destructive ten week strike when the union would not compromise for any other hiring alternative. Yet economic pressures, however strong and harmful they might be, do not create immunity for employers, at least not in [the injunctive] liability phase." 469 F. Supp., at 338.

Section 1981 provides Negroes "the same right" to make contracts as white persons enjoy. In the present cases, this unqualified right was violated, and the violation is made no more palatable because the persons who actually made the hiring decisions and referrals, and not the employer itself, engaged in intentional discrimination.[5] The devastating violation of their rights under § 1981 remains the same and will go at least partially unremedied when the person with whom the ultimate employment contract must be made is immunized from even injunctive relief. I cannot impute to the Congress which enacted § 1981 the intention to reach such an inequitable and nonsensical result. Accordingly, I must dissent.

---

[5] I agree with JUSTICE O'CONNOR's observation that nothing in the Court's opinion prevents the District Court on remand from holding the pe-

---

titioner associations liable for discrimination practiced by the JATC. Specifically, they may be held liable because the trustees administering the JATC are appointed by the petitioner associations, the JATC is funded by employer contributions, and the associations exercise control over the JATC's actions. I also agree with JUSTICE O'CONNOR that the Court's opinion does not prevent the District Court from requiring petitioners to comply with incidental or ancillary provisions contained in its injunctive order.

LORETTO *v*. TELEPROMPTER MANHATTAN CATV CORP. ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 81-244. Argued March 30, 1982—Decided June 30, 1982

A New York statute provides that a landlord must permit a cable television (CATV) company to install its CATV facilities upon his property and may not demand payment from the company in excess of the amount determined by a State Commission to be reasonable. Pursuant to the statute, the Commission ruled that a one-time $1 payment was a reasonable fee. After purchasing a five-story apartment building in New York City, appellant landlord discovered that appellee CATV companies had installed cables on the building, both "crossovers" for serving other buildings and "noncrossovers" for serving appellant's tenants. Appellant then brought a class action for damages and injunctive relief in a New York state court, alleging, *inter alia*, that installation of the cables insofar as appellee companies relied on the New York statute constituted a taking without just compensation. Appellee New York City, which had granted the companies an exclusive franchise to provide CATV within certain areas of the city, intervened. Upholding the New York statute, the trial court granted summary judgment to appellees. The Appellate Division of the New York Supreme Court affirmed, and on further appeal the New York Court of Appeals also upheld the statute, holding that it serves the legitimate police power purpose of eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting appellant's argument that a physical occupation authorized by government is necessarily a taking, the court further held that the statute did not have an excessive economic impact upon appellant when measured against her aggregate property rights, did not interfere with any reasonable investment-backed expectations, and accordingly did not work a taking of appellant's property.

Held: The New York statute works a taking of a portion of appellant's property for which she is entitled to just compensation under the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment. Pp. 425-441.

(a) When the "character of the governmental action," *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124, is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Pp. 426–435.

(b) To the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property. Moreover, the owner suffers a special kind of injury when a *stranger* invades and occupies the owner's property. Such an invasion is qualitatively more severe than a regulation of the *use* of property, since the owner may have no control over the timing, extent, or nature of the invasion. And constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied. Pp. 435–438.

(c) Here, the cable installation on appellant's building constituted a taking under the traditional physical occupation test, since it involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall. There is no constitutional difference between a crossover and noncrossover installation, since portions of the installation necessary for both types of installation permanently appropriated appellant's property. The fact that the New York statute applies only to buildings used as rental property does not make it simply a regulation of the use of real property. Physical occupation of one type of property but not another is no less a physical occupation. The New York statute does not purport to give the *tenant* any enforceable property rights with respect to CATV installation, and thus cannot be construed as merely granting a tenant a property right as an appurtenance to his leasehold. Application of the physical occupation rule in this case will not have dire consequences for the government's power to adjust landlord-tenant relationships, since it in no way alters the usual analysis governing a State's power to require landlords to comply with building codes. Pp. 438–440.

53 N. Y. 2d 124, 423 N. E. 2d 320, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and WHITE, JJ., joined, *post*, p. 442.

Michael S. Gruen argued the cause and filed briefs for appellant.

Erwin N. Griswold argued the cause for appellees. With him on the brief for appellees Teleprompter Manhattan

CATV Corp. et al. was *Michael Lesch*. *Frederick A. O. Schwarz, Jr.*, and *Leonard Koerner* filed a brief for appellee City of New York.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. N. Y. Exec. Law § 828(1) (McKinney Supp. 1981–1982). In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. 53 N. Y. 2d 124, 423 N. E. 2d 320 (1981). Because we conclude that such a physical occupation of property is a taking, we reverse.

I

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York City, in 1971. The previous owner had granted appellees Teleprompter Corp. and Teleprompter Manhattan CATV (collectively Teleprompter)[1] permission to install a cable on the building and the exclusive privilege of furnishing cable

---

**Michael D. Botwin* and *James J. Bierbower* filed a brief for the National Satellite Cable Association et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Robert Abrams*, Attorney General, *pro se*, *Shirley Adelson Siegel*, Solicitor General, and *Lawrence J. Logan*, Assistant Attorney General, for the Attorney General of New York; by *Brenda L. Fox*, *James H. Ewalt*, and *Robert St. John Roper* for the National Cable Television Association, Inc.; and by *Stuart Robinowitz* and *Richard A. Rosen* for the New York State Cable Television Association.

[1] Teleprompter Manhattan CATV was formerly a subsidiary, and is now a division, of Teleprompter Corp.

television (CATV) services to the tenants. The New York Court of Appeals described the installation as follows:

> "On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street." *Id.*, at 135, 423 N. E. 2d, at 324.

Teleprompter also installed two large silver boxes along the roof cables. The cables are attached by screws or nails penetrating the masonry at approximately two-foot intervals, and other equipment is installed by bolts.

Initially, Teleprompter's roof cables did not service appellant's building. They were part of what could be described as a cable "highway" circumnavigating the city block, with service cables periodically dropped over the front or back of a building in which a tenant desired service. Crucial to such a network is the use of so-called "crossovers"—cable lines extending from one building to another in order to reach a new group of tenants.[2] Two years after appellant purchased the building, Teleprompter connected a "noncrossover" line—*i. e.*, one that provided CATV service to appellant's own tenants—by dropping a line to the first floor down the front of appellant's building.

---

[2] The Court of Appeals defined a "crossover" more comprehensively as occurring:

"[W]hen (1) the line servicing the tenants in a particular building is extended to adjacent or adjoining buildings, (2) an amplifier which is placed on a building is used to amplify signals to tenants in that building and in a neighboring building or buildings, and (3) a line is placed on a building, none of the tenants of which are provided CATV service, for the purpose of providing service to an adjoining or adjacent building." 53 N. Y. 2d, at 133, n. 6, 423 N. E. 2d, at 323, n. 6.

Prior to 1973, Teleprompter routinely obtained authorization for its installations from property owners along the cable's route, compensating the owners at the standard rate of 5% of the gross revenues that Teleprompter realized from the particular property. To facilitate tenant access to CATV, the State of New York enacted § 828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not "interfere with the installation of cable television facilities upon his property or premises," and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable."[3] The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to § 828(1)(b), the State Commission has ruled that a one-time $1 payment is the normal fee to which a landlord is entitled. *In the Matter of Implementation of Section 828 of the Executive Law,* No. 90004, Statement of General Policy (New York State Commission on Cable Television, Jan. 15, 1976) (Statement of General Policy), App. 51–52; Clarification of General Policy (Aug. 27, 1976), App. 68–69. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York's Transportation Corporations Law, satisfied constitutional requirements "in the absence of a special showing of greater damages attributable to the taking." Statement of General Policy, App. 52.

---

[3] New York Exec. Law § 828 (McKinney Supp. 1981–1982) provides in part:

"1. No landlord shall

"a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

"i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

"ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and

"iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

"b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

"c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not."

Appellant did not discover the existence of the cable until after she had purchased the building. She brought a class action against Teleprompter in 1976 on behalf of all owners of real property in the State on which Teleprompter has placed CATV components, alleging that Teleprompter's installation was a trespass and, insofar as it relied on § 828, a taking without just compensation. She requested damages and injunctive relief.[4] Appellee City of New York, which has granted Teleprompter an exclusive franchise to provide CATV within certain areas of Manhattan, intervened. The Supreme Court, Special Term, granted summary judgment to Teleprompter and the city, upholding the constitutionality of § 828 in both crossover and noncrossover situations. 98 Misc. 2d 944, 415 N. Y. S. 2d 180 (1979). The Appellate Division affirmed without opinion. 73 App. Div. 2d 849, 422 N. Y. S. 2d 550 (1979).

On appeal, the Court of Appeals, over dissent, upheld the statute. 53 N. Y. 2d 124, 423 N. E. 2d 320 (1981). The court concluded that the law requires the landlord to allow both crossover and noncrossover installations but permits him to request payment from the CATV company under § 828(1)(b), at a level determined by the State Cable Commission, only for noncrossovers. The court then ruled that the law serves a legitimate police power purpose—eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting the argument that a physical occupation authorized by government is necessarily a taking, the court stated that the regulation does not have an excessive economic impact upon appellant when measured against her aggregate property rights, and that it does not interfere with any reasonable investment-backed expectations. Accordingly, the court held that § 828 does not work a taking of appellant's property. Chief Judge Cooke dissented, reasoning that the physical appropriation of a portion of appellant's property is a taking without regard to the balancing analysis courts ordinarily employ in evaluating whether a regulation is a taking.

---

[4] Class-action status was granted in accordance with appellant's request, except that owners of single-family dwellings on which a CATV component had been placed were excluded. Notice to the class has been postponed, however, by stipulation.

In light of its holding, the Court of Appeals had no occasion to determine whether the $1 fee ordinarily awarded for a noncrossover installation was adequate compensation for the taking. Judge Gabrielli, concurring, agreed with the dissent that the law works a taking but concluded that the $1 presumptive award, together with the procedures permitting a landlord to demonstrate a greater entitlement, affords just compensation. We noted probable jurisdiction. 454 U. S. 938 (1981).

II

The Court of Appeals determined that § 828 serves the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," 53 N. Y. 2d, at 143–144, 423 N. E. 2d, at 329, and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. See *Penn Central Transporta-*

tion Co. v. *New York City*, 438 U. S. 104, 127–128 (1978); *Delaware, L. & W. R. Co.* v. *Morristown*, 276 U. S. 182, 193 (1928). We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

A

In *Penn Central Transportation Co.* v. *New York City*, *supra*, the Court surveyed some of the general principles governing the Takings Clause. The Court noted that no "set formula" existed to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in "essentially ad hoc, factual inquiries." *Id.*, at 124. But the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. "So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Ibid.* (citation omitted).

As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.[5] As early as 1872, in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Id.*, at 181. Seven years later, the Court reemphasized the importance of a physical occupation by distinguishing a regulation that merely restricted the use of private property. In *Northern Transportation Co.* v. *Chicago*, 99 U. S. 635 (1879), the Court held that the city's construction of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs' property. The Court distinguished earlier cases in which permanent flooding of private property was regarded as a taking, *e. g.*, *Pumpelly*, *supra*, as involving "a physical invasion of the real estate of the private owner, and a practical ouster of his possession." In this case, by contrast, "[n]o entry was made upon the plaintiffs' lot." 99 U. S., at 642.

---

[5] Professor Michelman has accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence:

> "At one time it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur *only* through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1184 (1967) (emphasis in original; footnotes omitted).

See also 2 J. Sackman, Nichols' Law of Eminent Domain 6–50, 6–51 (rev. 3d ed. 1980); L. Tribe, American Constitutional Law 460 (1978).

For historical discussions, see 53 N. Y. 2d, at 157–158, 423 N. E. 2d, at 337–338 (Cooke, C. J., dissenting); F. Bosselman, D. Callies, & J. Banta, The Taking Issue 51 (1973); Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553, 600–601 (1972); Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 S. Ct. Rev. 63, 82; Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221, 225 (1931).

Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation. See *United States* v. *Lynah*, 188 U. S. 445, 468–470 (1903); *Bedford* v. *United States*, 192 U. S. 217, 225 (1904); *United States* v. *Cress*, 243 U. S. 316, 327–328 (1917); *Sanguinetti* v. *United States*, 264 U. S. 146, 149 (1924) (to be a taking, flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property"); *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, 809–810 (1950).

In *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92 (1893), the Court applied the principles enunciated in *Pumpelly* to a situation closely analogous to the one presented today. In that case, the Court held that the city of St. Louis could exact reasonable compensation for a telegraph company's placement of telegraph poles on the city's public streets. The Court reasoned:

> "The use which the [company] makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation

> thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. . . . *But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive.* It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of highway and personal travel, wholly lost to the public. . . .
>
> . . . . .
>
> ". . . It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." *Id.*, at 98–99, 101–102 (emphasis added).[6]

Similarly, in *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540 (1904), a telegraph company constructed and operated telegraph lines over a railroad's right of way. In holding that federal law did not grant the company the right of eminent domain or the right to operate the lines absent the railroad's consent, the Court assumed that the invasion of the telephone lines would be a compensable taking. *Id.*, at 570 (the right-of-way "cannot be appropriated in whole or in part except upon the payment of compensation"). Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land. See, *e. g.*, *Lovett* v. *West Va. Central Gas Co.*, 65 W. Va. 739, 65 S. E. 196 (1909); *Southwestern Bell Telephone Co.* v. *Webb*, 393 S. W. 2d 117, 121 (Mo. App. 1965). Cf. *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327 (1922). See generally 2 J. Sackman, Nichols' Law of Eminent Domain § 6.21 (rev. 3d ed. 1980).[7]

---

[6] The City of New York objects that this case only involved a city's right to charge for use of its streets, and not the power of eminent domain; the city could have excluded the company from any use of its streets. But the physical occupation principle upon which the right to compensation was based has often been cited as authority in eminent domain cases. See, *e. g.*, *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540, 566–567 (1904); *California* v. *United States*, 395 F. 2d 261, 263, n. 4 (CA9 1968). Also, the Court squarely held that insofar as the company relied on a federal statute authorizing its use of post roads, an appropriation of state property would require compensation. *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S., at 101.

More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property. In *United States* v. *Causby*, 328 U. S. 256 (1946), the Court ruled that frequent flights immediately above a landowner's property constituted a taking, comparing such overflights to the quintessential form of a taking:

> "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." *Id.*, at 261 (footnote omitted).

---

[7] Early commentators viewed a physical occupation of real property as the quintessential deprivation of property. See, *e. g.*, 1 W. Blackstone, Commentaries *139; J. Lewis, Law of Eminent Domain in the United States 197 (1888) ("Any invasion of property, except in case of necessity . . . , either upon, above or below the surface, and whether temporary or permanent, is a *taking:* as by constructing a ditch through it, passing under it by a tunnel, laying gas, water or sewer pipes in the soil, or extending structures over it, as a bridge or telephone wire" (footnote omitted; emphasis in original)); 1 P. Nichols, Law of Eminent Domain 282 (2d ed. 1917).

As the Court further explained,

> "We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *Id.*, at 264–265.

The Court concluded that the damages to the respondents "were not merely consequential. They were the product of a direct invasion of respondents' domain." *Id.*, at 265–266. See also *Griggs* v. *Allegheny County*, 369 U. S. 84 (1962).

Two wartime takings cases are also instructive. In *United States* v. *Pewee Coal Co.*, 341 U. S. 114 (1951), the Court unanimously held that the Government's seizure and direction of operation of a coal mine to prevent a national strike of coal miners constituted a taking, though members of the Court differed over which losses suffered during the period of Government control were compensable. The plurality had little difficulty concluding that because there had been an "actual taking of possession and control," the taking was as clear as if the Government held full title and ownership. *Id.*, at 116 (plurality opinion of Black, J., with whom Frankfurter, Douglas, and Jackson, JJ., joined; no other Justice challenged this portion of the opinion). In *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155 (1958), by contrast, the Court found no taking where the Government had issued a wartime order requiring nonessential gold mines to cease operations for the purpose of conserving equipment and manpower for use in mines more essential to the war effort. Over dissenting Justice Harlan's complaint that "as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession of these mines by the United States," *id.*, at 181, the Court reasoned that "the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them." *Id.*, at 165–166. The Court concluded that the temporary though severe restriction on *use* of the mines was justified by the exigency of war.[8] Cf. *YMCA* v. *United States*, 395 U. S. 85, 92 (1969) ("Ordinarily, of course, government occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation").

Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical *invasion* cases are special and have not repudiated the rule that any permanent physical *occupation* is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.

Penn Central Transportation Co. v. *New York City*, as noted above, contains one of the most complete discussions of the Takings Clause. The Court explained that resolving whether public action works a taking is ordinarily an ad hoc inquiry in which several factors are particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. 438 U. S., at 124. The opinion does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.[9]

---

[8] Indeed, although dissenting Justice Harlan would have treated the restriction as if it were a physical occupation, it is significant that he relied on physical appropriation as the paradigm of a taking. See *United States* v. *Central Eureka Mining Co.*, 357 U. S., at 181, 183–184.

[9] The City of New York and the opinion of the Court of Appeals place great emphasis on *Penn Central's* reference to a physical invasion "by government," 438 U. S., at 124, and argue that a similar invasion by a private

In *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), the Court held that the Government's imposition of a navigational servitude requiring public access to a pond was a taking where the landowner had reasonably relied on Government consent in connecting the pond to navigable water. The Court emphasized that the servitude took the landowner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.*, at 176. The Court explained:

> "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation. See *United States* v. *Causby*, 328 U. S. 256, 265 (1946); *Portsmouth Co.* v. *United States*, 260 U. S. 327 (1922)." *Id.*, at 180 (emphasis added).

Although the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character.[10]

---

party should be treated differently. We disagree. A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant. See, *e. g.*, *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166 (1872). *Penn Central* simply holds that in cases of physical invasion short of permanent appropriation, the fact that the government itself commits an invasion from which it directly benefits is one relevant factor in determining whether a taking has occurred. 438 U. S., at 124, 128.

[10] See also *Andrus* v. *Allard*, 444 U. S. 51 (1979). That case held that the prohibition of the sale of eagle feathers was not a taking as applied to traders of bird artifacts. "The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. . . . In this case, it is crucial that appellees retain the rights

Another recent case underscores the constitutional distinction between a permanent occupation and a temporary physical invasion. In *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), the Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property, to which they had already invited the general public. The Court emphasized that the State Constitution does not prevent the owner from restricting expressive activities by imposing reasonable time, place, and manner restrictions to minimize interference with the owner's commercial functions. Since the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, "the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative." *Id.*, at 84.[11]

In short, when the "character of the governmental action," *Penn Central*, 438 U. S., at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to

---

to possess and transport their property, and to donate or devise the protected birds. . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Id.*, at 65–66.

[11] Teleprompter's reliance on labor cases requiring companies to permit access to union organizers, see, *e. g.*, *Hudgens* v. *NLRB*, 424 U. S. 507 (1976); *Central Hardware Co.* v. *NLRB*, 407 U. S. 539 (1972); *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), is similarly misplaced. As we recently explained:

"[T]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights [to organize under the National Labor Relations Act]. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited." *Central Hardware Co.*, *supra*, at 545.

whether the action achieves an important public benefit or has only minimal economic impact on the owner.

B

The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, cf. *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979), the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.[12] See *Kaiser Aetna*,

---

[12] The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking. As *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), and the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

The dissent objects that the distinction between a permanent physical occupation and a temporary invasion will not always be clear. *Post*, at 448. This objection is overstated, and in any event is irrelevant to the critical point that a permanent physical occupation *is* unquestionably a taking. In the antitrust area, similarly, this Court has not declined to apply a *per se* rule simply because a court must, at the boundary of the rule, apply the rule of reason and engage in a more complex balancing analysis.

444 U. S., at 179–180; see also Restatement of Property §7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see *Andrus* v. *Allard*, *supra*, at 66, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. As Part II–A, *supra*, indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1228, and n. 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion. See n. 19, *infra*.

The traditional rule also avoids otherwise difficult line-drawing problems. Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.[13] Indeed, it is possible that in the future, additional cable installations that more significantly restrict a landlord's use of the roof of his building will be made. Section 828 requires a landlord to permit such multiple installations.[14]

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due.[15] For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

---

[13] In *United States* v. *Causby*, 328 U. S. 256 (1946), the Court approvingly cited *Butler* v. *Frontier Telephone Co.*, 186 N. Y. 486, 79 N. E. 716 (1906), holding that ejectment would lie where a telephone wire was strung across the plaintiff's property without touching the soil. The Court quoted the following language:

"'[A]n owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed.'" 328 U. S., at 265, n. 10, quoting *Butler* v. *Frontier Telephone Co.*, *supra*, at 491–492, 79 N. E. 718.

[14] Although the City of New York has granted an exclusive franchise to Teleprompter, it is not required to do so under state law, see N. Y. Exec. Law § 811 *et seq.* (McKinney Supp. 1981–1982), and future changes in technology may cause the city to reconsider its decision. Indeed, at present some communities apparently grant nonexclusive franchises. Brief for National Satellite Cable Association et al. as *Amici Curiae* 21.

[15] In this case, the Court of Appeals noted testimony preceding the enactment of § 828 that the landlord's interest in excluding cable installation "consists entirely of insisting that some negligible unoccupied space remain unoccupied." 53 N. Y. 2d, at 141, 423 N. E. 2d, at 328 (emphasis omitted). The State Cable Commission referred to the same testimony in establishing a $1 presumptive award. Statement of General Policy, App. 48.

A number of the dissent's arguments—that § 828 "likely increases both the building's resale value and its attractiveness on the rental market,"

C

Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.[16]

In light of our analysis, we find no constitutional difference between a crossover and a noncrossover installation. The portions of the installation necessary for both crossovers and noncrossovers permanently appropriate appellant's property. Accordingly, each type of installation is a taking.

Appellees raise a series of objections to application of the traditional rule here. Teleprompter notes that the law applies only to buildings used as rental property, and draws the

---

post, at 452, and that appellant might have no alternative use for the cable-occupied space, *post*, at 453–454—may also be relevant to the amount of compensation due. It should be noted, however, that the first argument is speculative and is contradicted by appellant's testimony that she and "the whole block" would be able to sell their buildings for a higher price absent the installation. App. 100.

[16] It is constitutionally irrelevant whether appellant (or her predecessor in title) had previously occupied this space, since a "landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *United States* v. *Causby*, *supra*, at 264.

The dissent asserts that a taking of about one-eighth of a cubic foot of space is not of constitutional significance. *Post*, at 443. The assertion appears to be factually incorrect, since it ignores the two large silver boxes that appellant identified as part of the installation. App. 90; Loretto Affidavit in Support of Motion for Summary Judgment (Apr. 21, 1978), Appellants' Appendix in No. 8300/76 (N. Y. App.), p. 77. Although the record does not reveal their size, appellant states that they are approximately 18″ x 12″ x 6″, Brief for Appellant 6 n.*, and appellees do not dispute this statement. The displaced volume, then, is in excess of 1½ cubic feet. In any event, these facts are not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox.

conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation. Insofar as Teleprompter means to suggest that this is not a permanent physical invasion, we must differ. So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it.[17]

Teleprompter also asserts the related argument that the State has effectively granted a tenant the property right to have a CATV installation placed on the roof of his building, as an appurtenance to the tenant's leasehold. The short answer is that § 828(1)(a) does not purport to give the *tenant* any enforceable property rights with respect to CATV installation, and the lower courts did not rest their decisions on this ground.[18] Of course, Teleprompter, not appellant's tenants, actually owns the installation. Moreover, the government does not have unlimited power to redefine property rights. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

---

[17] It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. Teleprompter's broad "use-dependency" argument proves too much. For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

[18] We also decline to hazard an opinion as to the respective rights of the landlord and tenant under state law *prior* to enactment of § 828 to use the space occupied by the cable installation, an issue over which the parties sharply disagree.

Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, *e. g.*, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946) (fire regulation); *Bowles* v. *Willingham*, 321 U. S. 503 (1944) (rent control); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242 (1922) (emergency housing law); *Block* v. *Hirsh*, 256 U. S. 135 (1921) (rent control). In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity. See *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978).[19]

---

[19] If § 828 required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The fact of ownership is, contrary to the dissent, not simply "incidental," *post*, at 450; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The *landlord* would de-

III

Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

Furthermore, our conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.[20]

---

cide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, esthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.

In this case, by contrast, appellant suffered injury that might have been obviated if she had owned the cable and could exercise control over its installation. The drilling and stapling that accompanied installation apparently caused physical damage to appellant's building. App. 83, 95–96, 104. Appellant, who resides in her building, further testified that the cable installation is "ugly." *Id.*, at 99. Although § 828 provides that a landlord may require "reasonable" conditions that are "necessary" to protect the appearance of the premises and may seek indemnity for damage, these provisions are somewhat limited. Even if the provisions are effective, the inconvenience to the landlord of initiating the repairs remains a cognizable burden.

[20] In light of our disposition of appellant's takings claim, we do not address her contention that § 828 deprives her of property without due process of law.

The judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE WHITE join, dissenting.

If the Court's decisions construing the Takings Clause state anything clearly, it is that "[t]here is no set formula to determine where regulation ends and taking begins." *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 594 (1962).[1]

In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid *per se* takings rule: "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Ante*, at 426. To sustain its rule against our recent precedents, the Court erects a strained and untenable distinction between "temporary physical invasions," whose constitutionality concededly "is subject to a balancing process," and "permanent physical occupations," which are "taking[s] without regard to other factors that a court might ordinarily examine." *Ante*, at 432.

In my view, the Court's approach "reduces the constitutional issue to a formalistic quibble" over whether property has been "permanently occupied" or "temporarily invaded." Sax, Takings and the Police Power, 74 Yale L. J. 36, 37

---

[1] See *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979); *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979) ("There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate"); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978); *United States* v. *Caltex, Inc.*, 344 U. S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses"); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416 (1922) (a takings question "is a question of degree—and therefore cannot be disposed of by general propositions").

(1964). The Court's application of its formula to the facts of this case vividly illustrates that its approach is potentially dangerous as well as misguided. Despite its concession that "States have broad power to regulate , . . the landlord-tenant relationship . . . without paying compensation for all economic injuries that such regulation entails," *ante*, at 440, the Court uses its rule to undercut a carefully considered legislative judgment concerning landlord-tenant relationships. I therefore respectfully dissent.

I

Before examining the Court's new takings rule, it is worth reviewing what was "taken" in this case. At issue are about 36 feet of cable one-half inch in diameter and two 4″ x 4″ x 4″ metal boxes. Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant's Manhattan apartment building. When appellant purchased that building in 1971, the "physical invasion" she now challenges had already occurred.[2] Appellant did not bring this action until about five years later, demanding 5% of appellee Teleprompter's gross revenues from her building, and claiming that the operation of N. Y. Exec. Law § 828 (McKinney

---

[2] In January 1968, appellee Teleprompter signed a 5-year installation agreement with the building's previous owner in exchange for a flat fee of $50. Appellee installed both the 30-foot main cable and its 4- to 6-foot "crossover" extension in June 1970. For two years after taking possession of the building and the appurtenant equipment, appellant did not object to the cable's presence. Indeed, despite numerous inspections, appellant had never even noticed the equipment until Teleprompter first began to provide cable television service to one of her tenants. 53 N. Y. 2d 124, 134–135, 423 N. E. 2d 320, 324 (1981). Nor did appellant thereafter ever specifically ask Teleprompter to remove the components from her building. App. 107, 108, 110.

Although the Court alludes to the presence of "two large silver boxes" on appellant's roof, *ante*, at 438, n. 16, the New York Court of Appeals' opinion nowhere mentions them, nor are their dimensions stated anywhere in the record.

Supp. 1981–1982) "took" her property. The New York Supreme Court, the Appellate Division, and the New York Court of Appeals all rejected that claim, upholding § 828 as a valid exercise of the State's police power.

The Court of Appeals held that

> "the State may proscribe a trespass action by landlords generally against a cable TV company which places a cable and other fixtures on the roof of any landlord's building, in order to protect the right of the tenants of rental property, who will ultimately have to pay any charge a landlord is permitted to collect from the cable TV company, to obtain TV service in their respective apartments." 53 N. Y. 2d 124, 153, 423 N. E. 2d 320, 335 (1981).

In so ruling, the court applied the multifactor balancing test prescribed by this Court's recent Takings Clause decisions. Those decisions teach that takings questions should be resolved through "essentially ad hoc, factual inquiries," *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979), into "such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980). See 53 N. Y. 2d, at 144–151, 423 N. E. 2d, at 330–334.

The Court of Appeals found, first, that § 828 represented a reasoned legislative effort to arbitrate between the interests of tenants and landlords and to encourage development of an important educational and communications medium.[3] *Id.*, at

---

[3] The court found that the state legislature had enacted § 828 to "prohibit gouging and arbitrary action" by "landlords [who] in many instances have imposed extremely onerous fees and conditions on cable access to their buildings." 53 N. Y. 2d, at 141, 423 N. E. 2d, at 328, citing testimony of Joseph C. Swidler, Chairman of the Public Service Commission, before the Joint Legislative Committee considering the CATV bill.

Given the growing importance of cable television, the legislature decided that urban tenants' need for access to that medium justified a minor intrusion upon the landlord's interest, which "consists entirely of insisting that

143–145, 423 N. E. 2d, at 329–330. Moreover, under *PruneYard Shopping Center* v. *Robins*, 447 U. S., at 83–84, the fact that § 828 authorized Teleprompter to make a minor physical intrusion upon appellant's property was in no way determinative of the takings question. 53 N. Y. 2d, at 146–147, 423 N. E. 2d, at 331.[4]

Second, the court concluded that the statute's economic impact on appellant was *de minimis* because § 828 did not affect the fair return on her property. 53 N. Y. 2d, at 148–150, 423 N. E. 2d, at 332–333. Third, the statute did not interfere with appellant's reasonable investment-backed expectations. *Id.*, at 150–151, 423 N. E. 2d, at 333–334. When appellant purchased the building, she was unaware of the existence of the cable. See n. 2, *supra*. Thus, she could not have invested in the building with any reasonable expectation that the one-eighth cubic foot of space occupied by the cable television installment would become income-productive. 53 N. Y. 2d, at 155, 423 N. E. 2d, at 336.

---

some negligible unoccupied space remain unoccupied. The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him." *Ibid.*, citing Regulation of Cable Television by the State of New York, Report to the New York Public Service Commission by Commissioner William K. Jones 207 (1970).

[4] Section 828 carefully regulates the cable television company's physical intrusion onto the landlord's property. If the landlord requests, the company must conform its installations "to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants." N. Y. Exec. Law § 828(1)(a)(i) (McKinney Supp. 1981–1982). Furthermore, the company must "agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities." § 828(1)(a)(iii). Finally, the statute authorizes the landlord to require either "the cable television company or the tenant or a combination thereof [to] bear the entire cost of the installation, operation or removal" of any equipment. § 828(1)(a)(ii).

II

Given that the New York Court of Appeals' straightforward application of this Court's balancing test yielded a finding of no taking, it becomes clear why the Court now constructs a *per se* rule to reverse. The Court can escape the result dictated by our recent takings cases only by resorting to bygone precedents and arguing that "permanent physical occupations" somehow differ qualitatively from all other forms of government regulation.

The Court argues that a *per se* rule based on "permanent physical occupation" is both historically rooted, see *ante*, at 426–435, and jurisprudentially sound, see *ante*, at 435–438. I disagree in both respects. The 19th-century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided.[5] But if, by chance, they have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age. Furthermore, I find logically untenable the Court's assertion that § 828 must be analyzed under a *per se* rule because it "effectively destroys" three of "the most treasured strands in an owner's bundle of property rights," *ante*, at 435.

---

[5] The Court properly acknowledges that none of our recent takings decisions have adopted a *per se* test for either temporary physical invasions or permanent physical occupations. See *ante*, at 432–435, and 435, n. 12. While the Court relies on historical dicta to support its *per se* rule, the only holdings it cites fall into two categories: a number of cases involving flooding, *ante*, at 427–428, and *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92 (1893), cited *ante*, at 428.

In 1950, the Court noted that the first line of cases stands for "the principle that the destruction of privately owned land by flooding is 'a taking' to the extent of the destruction caused," and that those rulings had already "been limited by later decisions in some respects." *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, 809–810. Even at the time of its decision, *St. Louis* v. *Western Union Telegraph Co.* addressed only the question "[w]hether the city has power to collect rental for the use of streets and public places" when a private company seeks exclusive use of land whose "use is common to all members of the public, and . . . [is] open equally to citizens of other States with those of the State in which the street is situate." 148 U. S., at 98–99. On its face, that issue is distinct from the question here: whether appellant may extract from Teleprompter a fee for the continuing use of her roof space above and beyond the fee set by statute, namely, "any amount which the commission shall, by regulation, determine to be reasonable." N. Y. Exec. Law § 828(1)(b) (McKinney Supp. 1982).

A

The Court's recent Takings Clause decisions teach that *nonphysical* government intrusions on private property, such as zoning ordinances and other land-use restrictions, have become the rule rather than the exception. Modern government regulation exudes intangible "externalities" that may diminish the value of private property far more than minor physical touchings. Nevertheless, as the Court recognizes, it has "often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest." *Ante*, at 426. See, *e. g.*, *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124–125 (1978); *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926).

Precisely because the extent to which the government may injure private interests now depends so little on whether or not it has authorized a "physical contact," the Court has avoided *per se* takings rules resting on outmoded distinctions between physical and nonphysical intrusions. As one commentator has observed, a takings rule based on such a distinction is inherently suspect because "its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1227 (1967).

Surprisingly, the Court draws an even finer distinction today—between "temporary physical invasions" and "permanent physical occupations." When the government authorizes the latter type of intrusion, the Court would find "a taking without regard to the public interests" the regulation may serve. *Ante*, at 426. Yet an examination of each of the three words in the Court's "permanent physical occupation" formula illustrates that the newly created distinction is even less substantial than the distinction between physical and nonphysical intrusions that the Court already has rejected.

First, what does the Court mean by "permanent"? Since all "temporary limitations on the right to exclude" remain "subject to a more complex balancing process to determine whether they are a taking," *ante*, at 435, n. 12, the Court presumably describes a government intrusion that lasts forever. But as the Court itself concedes, § 828 does not require appellant to permit the cable installation forever, but only "[s]o long as the property remains residential and a CATV company wishes to retain the installation." *Ante*, at 439. This is far from "permanent."

The Court reaffirms that "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Ante*, at 440. Thus, § 828 merely defines one of the many statutory responsibilities that a New Yorker accepts when she enters the rental business. If appellant occupies her own building, or converts it into a commercial property, she becomes perfectly free to exclude Teleprompter from her one-eighth cubic foot of roof space. But once appellant chooses to use her property for rental purposes, she must comply with all reasonable government statutes regulating the landlord-tenant relationship.[6] If § 828 authorizes a "permanent" occupation, and thus works a taking "without regard to the public interests that it may serve," then all other New York statutes that require a landlord to make physical attachments to his rental property also must constitute takings, even if they serve indisputably valid public interests in tenant protection and safety.[7]

---

[6] In my view, the fact that § 828 incidentally protects so-called "crossover" wires that do not currently serve tenants, see *ante*, at 422, n. 2, does not affect § 828's fundamental character as a piece of landlord-tenant legislation. As the Court recognizes, *ante*, at 422, crossovers are crucial links in the cable "highway," and represent the simplest and most economical

The Court denies that its theory invalidates these statutes, because they "do not require the landlord to suffer the physical occupation of a portion of his building by a third party." *Ante*, at 440. But surely this factor cannot be determinative, since the Court simultaneously recognizes that tem-

---

way to provide service to tenants in a group of buildings in close proximity. Like the Court, I find "no constitutional difference between a crossover and a noncrossover installation," *ante*, at 438. Even assuming, *arguendo*, that the crossover extension in this case works a taking, I would be prepared to hold that the incremental governmental intrusion caused by that 4- to 6-foot wire, which occupies the cubic volume of a child's building block, is a *de minimis* deprivation entitled to no compensation.

[7] See, *e. g.*, N. Y. Mult. Dwell. Law § 35 (McKinney 1974) (requiring entrance doors and lights); § 36 (windows and skylights for public halls and stairs); § 50–a (Supp. 1982) (locks and intercommunication systems); § 50–c (lobby attendants); § 51–a (peepholes); § 51–b (elevator mirrors); § 53 (fire escapes); § 57 (bells and mail receptacles); § 67(3) (fire sprinklers). See also *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946) (upholding constitutionality of New York fire sprinkler provision).

These statutes specify in far greater detail than § 828 what types of physical facilities a New York landlord must provide his tenants and where he must provide them. See, *e. g.*, N. Y. Mult. Dwell. Law § 75 (McKinney 1974) (owners of multiple dwellings must provide "proper appliances to receive and distribute an adequate supply of water," including "a proper sink with running water and with a two-inch waste and trap"); § 35 (owners of multiple dwellings with frontage exceeding 22 feet must provide "at least two lights, one at each side of the entrance way, with an aggregate illumination of one hundred fifty watts or equivalent illumination"); § 50–a(2) (Supp. 1981–1982) (owners of Class A multiple dwellings must provide intercommunication system "located at an automatic self-locking door giving public access to the main entrance hall or lobby").

Apartment building rooftops are not exempted. See § 62 (landlords must place parapet walls and guardrails on their roofs "three feet six inches or more in height above the level of such area").

porary invasions by third parties are not subject to a *per se* rule. Nor can the qualitative difference arise from the incidental fact that, under § 828, Teleprompter, rather than appellant or her tenants, owns the cable installation. Cf. *ante*, at 440, and n. 19. If anything, § 828 leaves appellant better off than do other housing statutes, since it ensures that her property will not be damaged esthetically or physically, see n. 4, *supra*, without burdening her with the cost of buying or maintaining the cable.

In any event, under the Court's test, the "third party" problem would remain even if appellant herself owned the cable. So long as Teleprompter continuously passed its electronic signal through the cable, a litigant could argue that the second element of the Court's formula—a "physical touching" by a stranger—was satisfied and that § 828 therefore worked a taking.[8] Literally read, the Court's test opens the door to endless metaphysical struggles over whether or not an individual's property has been "physically" touched. It was precisely to avoid "permit[ting] technicalities of form to dictate consequences of substance," *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 181 (1958) (Harlan, J., dissenting), that the Court abandoned a "physical contacts" test in the first place.

Third, the Court's talismanic distinction between a continuous "occupation" and a transient "invasion" finds no basis in either economic logic or Takings Clause precedent. In the landlord-tenant context, the Court has upheld against takings challenges rent control statutes permitting "temporary" physical invasions of considerable economic magnitude. See, *e. g.*, *Block* v. *Hirsh*, 256 U. S. 135 (1921) (statute permitting tenants to remain in physical possession of their apartments for two years after the termination of their leases). Moreover, precedents record numerous other "temporary" officially authorized invasions by third parties that have intruded into an owner's enjoyment of property far more deeply than did Teleprompter's long-unnoticed cable. See, *e. g.*, *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980) (leafletting and demonstrating in busy shopping center); *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979) (public easement of passage to private pond); *United States* v. *Causby*, 328 U. S. 256 (1946) (noisy airplane flights over private land). While, under the Court's balancing test, some of these "temporary invasions" have been found to be takings, the Court has subjected none of them to the inflexible *per se* rule now adapted to analyze the far less obtrusive "occupation" at issue in the present case. Cf. *ante*, at 430–431, 432–435.

---

[8] Indeed, appellant's counsel made precisely this claim at oral argument. Urging the rule which the Court now adopts, appellant's counsel suggested that a taking would result even if appellant owned the cable. "[T]he precise location of the easement [taken by Teleprompter changes] from the surface of the roof to inside the wire. . . . [T]he wire itself is owned by the landlord, but the cable company has the right to pass its signal through the wire without compensation to the landlord, for its commercial benefit." Tr. of Oral Arg. 15.

In sum, history teaches that takings claims are properly evaluated under a multifactor balancing test. By directing that all "permanent physical occupations" automatically are compensable, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," *ante*, at 434–435, the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its *per se* rule. Cf. n. 8, *supra*. I do not relish the prospect of distinguishing the inevitable flow of certiorari petitions attempting to shoehorn insubstantial takings claims into today's "set formula."

B

Setting aside history, the Court also states that the permanent physical occupation authorized by § 828 is a *per se* taking because it uniquely impairs appellant's powers to dispose of, use, and exclude others from, her property. See *ante*, at

435–438. In fact, the Court's discussion nowhere demonstrates how § 828 impairs these private rights in a manner *qualitatively* different from other garden-variety landlord-tenant legislation.

The Court first contends that the statute impairs appellant's legal right to dispose of cable-occupied space by transfer and sale. But that claim dissolves after a moment's reflection. If someone buys appellant's apartment building, but does not use it for rental purposes, that person can have the cable removed, and use the space as he wishes. In such a case, appellant's right to dispose of the space is worth just as much as if § 828 did not exist.

Even if another landlord buys appellant's building for rental purposes, § 828 does not render the cable-occupied space valueless. As a practical matter, the regulation ensures that tenants living in the building will have access to cable television for as long as that building is used for rental purposes, and thereby likely increases both the building's resale value and its attractiveness on the rental market.[9]

In any event, § 828 differs little from the numerous other New York statutory provisions that require landlords to install physical facilities "permanently occupying" common spaces in or on their buildings. As the Court acknowledges, the States traditionally—and constitutionally—have exercised their police power "to require landlords to . . . provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building." *Ante*, at 440. Like § 828, these provisions merely ensure tenants access to services the legislature deems important, such as water, electricity, natural light, telephones, intercommunication systems, and mail service. See n. 7, *supra*. A landlord's dispositional rights are affected no more adversely when he sells a building to another landlord subject to § 828, than when he sells that building subject only to these other New York statutory provisions.

---

[9] In her pretrial deposition, appellant conceded not only that owners of other apartment buildings thought that the cable's presence had enhanced the market value of their buildings, App. 102–103, but also that her own tenants would have been upset if the cable connection had been removed. *Id.*, at 107, 108, 110.

The Court also suggests that § 828 unconstitutionally alters appellant's right to control the *use* of her one-eighth cubic foot of roof space. But other New York multiple dwelling statutes not only oblige landlords to surrender significantly larger portions of common space for their tenants' use, but also compel the *landlord*—rather than the tenants or the private installers—to pay for and to maintain the equipment. For example, New York landlords are required by law to provide and pay for mailboxes that occupy more than five times the volume that Teleprompter's cable occupies on appellant's building. See Tr. of Oral Arg. 42–43, citing N. Y. Mult. Dwell. Law § 57 (McKinney 1974). If the State constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why the State may not require her to surrender less space, *filled at another's expense*, so that those same tenants can receive television signals.

For constitutional purposes, the relevant question cannot be solely *whether* the State has interfered in some minimal way with an owner's use of space on her building. Any intelligible takings inquiry must also ask whether the *extent* of the State's interference is so severe as to constitute a compensable taking in light of the owner's alternative uses for the property.[10] Appellant freely admitted that she would have had no other use for the cable-occupied space, were Teleprompter's equipment not on her building. See App. 97 (Deposition of Jean A. Loretto).

---

[10] For this reason, the Court provides no support for its *per se* rule by asserting that the State could not require landlords, without compensation, "to permit third parties to install swimming pools," *ante*, at 436, or vending and washing machines, *ante*, at 439, n. 17, for the convenience of tenants. Presumably, these more intrusive government regulations would create difficult takings problems even under our traditional balancing approach. Depending on the character of the governmental action, its economic impact, and the degree to which it interfered with an owner's reasonable investment-backed expectations, among other things, the Court's hypothetical examples might or might not constitute takings. These examples

The Court's third and final argument is that § 828 has deprived appellant of her "power to exclude the occupier from possession and use of the space" occupied by the cable. *Ante*, at 435. This argument has two flaws. First, it unjustifiably assumes that appellant's tenants have no countervailing property interest in permitting Teleprompter to use that space.[11] Second, it suggests that the New York Legislature may not exercise its police power to affect appellant's common-law right to exclude Teleprompter even from one-eighth cubic foot of roof space. But this Court long ago recognized that new social circumstances can justify legislative modification of a property owner's common-law rights, without compensation, if the legislative action serves sufficiently important public interests. See *Munn* v. *Illinois*, 94 U. S. 113, 134 (1877) ("A person has no property, no vested interest, in any rule of the common law. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstance"); *United States* v. *Causby*, 328 U. S., at 260–261 (In the modern world, "[c]ommon sense revolts at the idea" that legislatures cannot alter common-law ownership rights).

---

hardly prove, however, that a permanent physical occupation that works a *de minimis* interference with a private property interest is a taking *per se*.

[11] It is far from clear that, under New York law, appellant's tenants would lack all property interests in the few square inches on the exterior of the building to which Teleprompter's cable and hardware attach. Under modern landlord-tenant law, a residential tenancy is not merely a possessory interest in specified space, but also a contract for the provision of a package of services and facilities necessary and appurtenant to that space. See R. Schoshinski, American Law of Landlord and Tenant § 3:14 (1980). A modern urban tenant's leasehold often includes not only contractual, but also statutory, rights, including the rights to an implied warranty of habitability, rent control, and such services as the landlord is obliged by statute to provide. Cf. n. 7, *supra*.

As the Court of Appeals recognized, § 828 merely deprives appellant of a common-law trespass action against Teleprompter, but only for as long as she uses her building for rental purposes, and as long as Teleprompter maintains its equipment in compliance with the statute. JUSTICE MARSHALL recently and most aptly observed:

> "[Appellant's] claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State . . . . If accepted, that claim would represent a return to the era of *Lochner* v. *New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center* v. *Robins*, 447 U. S., at 93 (concurring opinion).

III

In the end, what troubles me most about today's decision is that it represents an archaic judicial response to a modern social problem. Cable television is a new and growing, but somewhat controversial, communications medium. See Brief for New York State Cable Television Association as *Amicus Curiae* 6–7 (about 25% of American homes with televisions—approximately 20 million families—currently subscribe to cable television, with the penetration rate expected to double by 1990). The New York Legislature not only recognized, but also responded to, this technological advance by enacting a statute that sought carefully to balance the interests of all private parties. See nn. 3 and 4, *supra*. New York's courts in this litigation, with only one jurist in dissent, unanimously upheld the constitutionality of that considered legislative judgment.

This Court now reaches back in time for a *per se* rule that disrupts that legislative determination.[12] Like Justice Black, I believe that "the solution of the problems precipitated by . . . technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." *United States* v. *Causby*, 328 U. S., at 274 (dissenting opinion). I would affirm the judgment and uphold the reasoning of the New York Court of Appeals.

---

[12] Happily, the Court leaves open the question whether § 828 provides landlords like appellant sufficient compensation for their actual losses. See *ante*, at 441. Since the State Cable Television Commission's regulations permit higher than nominal awards if a landlord makes "a special showing of greater damages," App. 52, the concurring opinion in the New York Court of Appeals found that the statute awards just compensation. See 53 N. Y. 2d, at 155, 423 N. E. 2d, at 336 ("[I]t is obvious that a landlord who actually incurs damage to his property or is restricted in the use to which he might put that property will receive compensation commensurate with the greater injury"). If, after the remand following today's decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the net result will have been a large expenditure of judicial resources on a constitutional claim of little moment.

WASHINGTON ET AL. *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81–9. Argued March 22, 1982—Decided June 30, 1982

In 1978, appellee Seattle School District No. 1 (District) enacted the so-called Seattle Plan for desegregation of its schools. The plan makes extensive use of mandatory busing. Subsequently, a statewide initiative (Initiative 350) was drafted to terminate the use of mandatory busing for purposes of racial integration in the public schools of the State of Washington. The initiative prohibits school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home. It sets out a number of broad exceptions to this requirement, however: a student may be assigned beyond his neighborhood school if he requires special educational programs, or if the nearest or next nearest school is overcrowded or unsafe, or if it lacks necessary physical facilities. These exceptions permit school boards to assign students away from their neighborhood schools for virtually all of the nonintegrative purposes required by their educational policies. After the initiative was passed at the November 1978 general election, the District, together with two other districts, brought suit against appellant State in Federal District Court, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The District Court held the initiative unconstitutional on the ground, *inter alia*, that it established an impermissible racial classification in violation of *Hunter* v. *Erickson*, 393 U. S. 385, and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY), summarily aff'd, 402 U. S. 935, "because it permits busing for non-racial reasons but forbids it for racial reasons." The court permanently enjoined implementation of the initiative's restrictions. The Court of Appeals affirmed.

Held: Initiative 350 violates the Equal Protection Clause. Pp. 467–487.

(a) When a State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process, its action "places *special* burdens on racial minorities within the governmental process," *Hunter* v. *Erickson*, 393 U. S., at 391, thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395. Such a structuring of the political process is "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.*, at 391. Pp. 467–470.

(b) Initiative 350 must fall because it does "not attemp[t] to allocate governmental power on the basis of any general principle," *Hunter* v. *Erickson*, 393 U. S., at 395, but instead uses the racial nature of an issue to define the governmental decisionmaking structure, thus imposing substantial and unique burdens on racial minorities. The initiative worked a major reordering of the State's educational decisionmaking process. Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was committed to the local board's discretion. After passage of Initiative 350, authority over all but one of these areas remained in the local board's hands. By placing power over desegregative busing at the state level, the initiative thus "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee* v. *Nyquist*, 318 F. Supp., at 718. And Initiative 350 works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools by lodging decisionmaking authority over the question at a new and remote level of government. This makes the enactment of racially beneficial legislation uniquely difficult, and therefore imposes direct and undeniable burdens on minority interests. Pp. 470–484.

(c) Contrary to appellants' suggestion, *Hunter* v. *Erickson* was not effectively overruled by *Washington* v. *Davis*, 426 U. S. 229, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252. While *Washington* v. *Davis* and *Arlington Heights* considered classifications facially unrelated to race, *Hunter*—like this case—involved an attempt to use explicitly racial criteria to define the community's decisionmaking structure. In so doing, the legislation at issue there directly and invidiously curtailed "the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4. *Hunter*'s principle—that meaningful and unjustified distinctions based on race are impermissible—is still vital. Pp. 484–487.

633 F. 2d 1338, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 488.

Kenneth O. Eikenberry, Attorney General of Washington, argued the cause for appellants. With him on the briefs were *Malachy R. Murphy*, Deputy Attorney General, *Thomas F. Carr*, Senior Assistant Attorney General, and *Timothy R. Malone*, Assistant Attorney General. *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, and *Richard G. Wilkins* filed a brief for the United States.

Michael W. Hoge argued the cause for appellees. With him on the brief for appellees Seattle School District No. 1 et al. were *Camden M. Hall* and *David J. Burman*. *Phillip L. Burton*, *Frederick L. Noland*, *Thomas A. Lemly*, and *William H. Neukom* filed a brief for appellees American Civil Liberties Union et al. *Ladd Leavens* filed a brief for appellees East Pasco Neighborhood Council et al.*

JUSTICE BLACKMUN delivered the opinion of the Court.

We are presented here with an extraordinary question: whether an elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State.

I

A

Seattle School District No. 1 (District), which is largely coterminous with the city of Seattle, Wash., is charged by state law with administering 112 schools and educating approximately 54,000 public school students. About 37% of these

---

*Briefs of *amici curiae* urging affirmance were filed by *Henry M. Aronson* for Grant L. Anderson et al.; by *Palmer Smith* for the League of Women Voters of Seattle et al.; by *Jack Greenberg*, *James M. Nabrit III*, and *Bill Lann Lee* for the NAACP Legal Defense and Educational Fund; and by *Judith A. Lonnquist* for the Washington Education Association.

Briefs of *amici curiae* were filed by *Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon* for the National School Boards Association; and by *William J. Bender* for the Seattle Chapter Japanese American Citizens League.

children are of Negro, Asian, American Indian, or Hispanic ancestry. Because segregated housing patterns in Seattle have created racially imbalanced schools, the District historically has taken steps to alleviate the isolation of minority students; since 1963, it has permitted students to transfer from their neighborhood schools to help cure the District's racial imbalance.[1]

Despite these efforts, the District in 1977 came under increasing pressure to accelerate its program of desegregation.[2] In response, the District's Board of Directors (School Board) enacted a resolution defining "racial imbalance" as "the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment . . . of no school will exceed 50 percent of the student body." 473 F. Supp. 996, 1006 (WD Wash. 1979). The District resolved to eliminate all such imbalance from the Seattle public schools by the beginning of the 1979–1980 academic year.[3]

---

[1] In 1971, the District implemented a program of mandatory reassignments to integrate certain of its middle schools. This prompted an attempt to recall four School Board members who had voted for the program. That attempt narrowly failed. See 473 F. Supp. 996, 1006 (WD Wash. 1979).

[2] Several community organizations threatened legal action if the District did not initiate a more effective integration effort, while the Mayor of Seattle and a number of community leaders, by letter dated May 20, 1977, urged the District to adopt "a definition of racial isolation and measurable goals leading to the elimination of racial isolation in the Seattle Public Schools prior to a Court ordered and mandated desegregation remedy." App. 139.

[3] The District Court found that the actions of the School Board were prompted by its members' "desire to ward off threatened litigation, their desire to prevent the threatened loss of federal funds, their desire to relieve the black students of the disproportionate burden which they had borne in the voluntary efforts to balance the schools racially and their perception that racial balance in the schools promotes the attainment of equal educational opportunity and is beneficial in the preparation of all students for democratic citizenship regardless of their race." 473 F. Supp., at 1007.

In September 1977, the District implemented a "magnet" program, designed to alleviate racial isolation by enhancing educational offerings at certain schools, thereby encouraging voluntary student transfers. A "disproportionate amount of the overall movement" inspired by the program was undertaken by Negro students, however, *ibid.*, and racial imbalance in the Seattle schools was found to have actually increased between the 1970–1971 and 1977–1978 academic years. The District therefore concluded that mandatory reassignment of students was necessary if racial isolation in its schools was to be eliminated. Accordingly, in March 1978, the School Board enacted the so-called "Seattle Plan" for desegregation. The plan, which makes extensive use of busing and mandatory reassignments, desegregates elementary schools by "pairing" and "triading" predominantly minority with predominantly white attendance areas, and by basing student assignments on attendance zones rather than on race. The racial makeup of secondary schools is moderated by "feeding" them from the desegregated elementary schools. App. 142–143. The District represents that the plan results in the reassignment of roughly equal numbers of white and minority students, and allows most students to spend roughly half of their academic careers attending a school near their homes. Brief for Appellee Seattle School District No. 1, p. 5.

The desegregation program, implemented in the 1978–1979 academic year, apparently was effective: the District Court found that the Seattle Plan "has substantially reduced the number of racially imbalanced schools in the district and has substantially reduced the percentage of minority students in those schools which remain racially imbalanced." 473 F. Supp., at 1007.

B

In late 1977, shortly before the Seattle Plan was formally adopted by the District, a number of Seattle residents who opposed the desegregation strategies being discussed by the School Board formed an organization called the Citizens for

Voluntary Integration Committee (CiVIC). This organization, which the District Court found "was formed because of its founders' opposition to The Seattle Plan," *ibid.*, attempted to enjoin implementation of the Board's mandatory desegregation program through litigation in state court; when these efforts failed, CiVIC drafted a statewide initiative designed to terminate the use of mandatory busing for purposes of racial integration.[4] This proposal, known as Initiative 350, provided that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student . . . ." See Wash. Rev. Code § 28A.26.010 (1981).[5] The initiative then set out, however, a number of broad exceptions to this requirement: a student may be assigned beyond his neighborhood school if he "requires special education, care or guidance," or if "there are health or safety hazards, either natural or man made, or physical barriers or obstacles . . . between the student's place of residence and the nearest or next nearest school," or if "the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities." See *ibid.* Initiative 350 also specifically proscribed use of seven enumerated methods of "indirec[t]" student assignment—among them the redefinition of attendance zones, the pairing of schools, and the use of

---

[4] Washington's Constitution reserves to the people of the State "the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature." Wash. Const., Art. II, § 1. Such initiatives are placed on the ballot upon the petition of 8% of the State's voters registered and voting for governor at the last preceding regular gubernatorial election. § 1(a). If passed by the electorate, an initiative may not be repealed by the state legislature for two years, although it may be amended within two years by a vote of two-thirds of each house of the legislature. § 41. See generally Comment, Judicial Review of Laws Enacted by Popular Vote, 55 Wash. L. Rev. 175 (1979).

[5] The text of Initiative 350 is now codified as Wash. Rev. Code §§ 28A.26.-010–28A.26.900 (1981).

"feeder" schools—that are a part of the Seattle Plan. See §28A.26.030. The initiative envisioned busing for racial purposes in only one circumstance: it did not purport to "prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." See §28A.26.060.

Its proponents placed Initiative 350 on the Washington ballot for the November 1978 general election. During the ensuing campaign, the District Court concluded, the leadership of CiVIC "acted legally and responsibly," and did not address "its appeals to the racial biases of the voters." 473 F. Supp., at 1009. At the same time, however, the court's findings demonstrate that the initiative was directed solely at desegregative busing in general, and at the Seattle Plan in particular. Thus, "[e]xcept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students," *id.*, at 1008, and "[e]xcept for racially-balancing purposes" the initiative "permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools." *Id.*, at 1010.[6] In campaigning for the measure, CiVIC officials accurately represented that its passage would result in "no loss of school district flexibility other than in busing for desegregation purposes," *id.*, at 1008, and it is evident that the campaign focused almost exclusively on the wisdom of "forced busing" for integration. See *id.*, at 1009.

On November 8, 1978, two months after the Seattle Plan went into effect, Initiative 350 passed by a substantial margin, drawing almost 66% of the vote statewide. The initiative failed to attract majority support in two state legislative districts, both in Seattle. In the city as a whole, however, the initiative passed with some 61% of the vote. Within the month, the District, together with the Tacoma and Pasco School Districts,[7] initiated this suit against the State in the United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The United States and several community organizations intervened in support of the District;[8] CiVIC intervened on behalf of the defendants.

---

[6] At the beginning of the 1978–1979 academic year, approximately 300,000 of the 769,040 students enrolled in Washington's public schools were bused to school. Ninety-five percent of these students were transported for reasons unrelated to race. 473 F. Supp., at 1002.

After a 9-day trial, the District Court made extensive and detailed findings of fact. The court determined that "[t]hose Seattle schools which are most crowded are located in those areas of the city where the preponderance of minority families live." *Id.*, at 1001. Yet the court found that Initiative 350, if implemented, "will prevent the racial balancing of a significant number of Seattle schools and will cause the school system to become more racially imbalanced than it presently is," "will make it impossible for Tacoma schools to maintain their present racial balance," and will make "doubtful" the prospects for integration of the Pasco schools. *Id.*, at 1010; see *id.*, at 1001, 1011. Except for desegregative busing, however, the court found that "almost all of the busing of students currently taking place in [Washington] is permitted by Initiative 350." *Id.*, at 1010. And while the court found that "racial bias . . . is a factor in the opposition to the 'busing' of students to obtain racial balance," *id.*, at 1001, it also found that voters were moved to support Initiative 350 for "a number of reasons," so that "[i]t is impossible to ascertain all of those reasons [o]r to determine the relative impact of those reasons upon the electorate." *Id.*, at 1010.

---

[7] Along with Seattle, Tacoma School District No. 10 and Pasco School District No. 1 are the only districts in the State of Washington with comprehensive integration programs, and therefore the three are the only districts affected by Initiative 350. See *id.*, at 1009. Since 1965, Pasco has made use of school closures and a mandatory busing program to overcome the racial isolation caused by segregated housing patterns; if students attended the schools nearest their homes, three of Pasco's seven elementary schools would have a primarily white and three a primarily minority student body. *Id.*, at 1002–1003. The Tacoma School District has made use of school closures, racially controlled enrollment at magnet schools, and voluntary transfers—though not mandatory busing—to enhance racial balance in its schools. *Id.*, at 1003–1004.

[8] Several of the intervenor plaintiffs also alleged that the District had engaged in *de jure* segregation, and therefore was operating an unconstitutional dual school system. The District Court therefore bifurcated the litigation, first addressing the constitutionality of Initiative 350. Because of the court's conclusions on that question, the allegations of *de jure* segregation did not go to trial and have not been addressed by the District Court or by the Court of Appeals.

The District Court then held Initiative 350 unconstitutional for three independent reasons. The court first concluded that the initiative established an impermissible racial classification in violation of *Hunter* v. *Erickson*, 393 U. S. 385 (1969), and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), "because it permits busing for non-racial reasons but forbids it for racial reasons." 473 F. Supp., at 1012. The court next held Initiative 350 invalid because "a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative." *Id.*, at 1013.[9] Finally, the District Court reasoned that Initiative 350 was unconstitutionally overbroad, because in the absence of a court order it barred even school boards that had engaged in *de jure* segregation from taking steps to foster integration.[10] *Id.*, at 1016. The court permanently enjoined implementation of the initiative's restrictions.

---

[9] The District Court acknowledged that it was impossible to determine whether the supporters of Initiative 350 "subjectively [had] a racially discriminatory intent or purpose," because "[a]s to that subjective intent the secret ballot raises an impenetrable barrier." *Id.*, at 1014. The court looked instead to objective factors, noting that it "marked [a] departure from the norm . . . for the autonomy of school boards to be restricted relative to the assignment of students," and that it marked a similar "departure from the procedural norm" for "an administrative decision of a subordinate local unit of government . . . [to be] overridden in a statewide initiative." *Id.*, at 1016. These factors, when coupled with the "racially disproportionate impact of the initiative," its "historical background," and "the sequence of events leading to its adoption," were found to demonstrate that a "racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative." *Ibid.*

On the merits, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, relying entirely on the District Court's first rationale. 633 F. 2d 1338 (1980).[11] By subjecting desegregative student assignments to unique treatment, the Court of Appeals concluded, Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." *Id.*, at 1344. In doing so, the court continued, the initiative "*remove[s]* from local school boards their existing authority, and in large part their capability, to enact programs designed to desegregate the schools." *Id.*, at 1346 (emphasis in original and footnote omitted). The court found such a result contrary to the principles of *Hunter* v. *Erickson*, *supra*, and *Lee* v. *Nyquist*, *supra*. The court acknowledged that the issue would be a different one had a successor school board attempted to rescind the Seattle Plan. Here, however, "a different governmental body—the state-wide electorate—rescinded a policy voluntarily enacted by locally elected school boards already subject to local political control." 633 F. 2d, at 1346.[12]

---

[10] The District Court noted that school boards that had practiced *de jure* segregation are under an affirmative obligation to eliminate the effects of that practice. *Ibid.* See *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 458–459 (1979).

[11] The Court of Appeals therefore did not address the District Court's alternative finding that Initiative 350 had been adopted for discriminatory reasons, or its conclusion that the initiative was overbroad. 633 F. 2d, at 1342.

[12] After the decision on the merits, the District Court had declined to award attorney's fees to the plaintiff School Districts because the Districts are state-funded entities. App. to Juris. Statement C–1. The Court of

The State and various state officers appealed to this Court. We noted probable jurisdiction to address an issue of significance to our Nation's system of education. 454 U. S. 890 (1981).

II

The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner. See *White* v. *Regester*, 412 U. S. 755 (1973); *Nixon* v. *Herndon*, 273 U. S. 536 (1927). But the Fourteenth Amendment also reaches "a political structure that treats all individuals as equals," *Mobile* v. *Bolden*, 446 U. S. 55, 84 (1980) (STEVENS, J., concurring in judgment), yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.

This principle received its clearest expression in *Hunter* v. *Erickson*, *supra*, a case that involved attempts to overturn antidiscrimination legislation in Akron, Ohio. The Akron City Council, pursuant to its ordinary legislative processes, had enacted a fair housing ordinance. In response, the local citizenry, using an established referendum procedure, see 393 U. S., at 390, and n. 6; *id.*, at 393–394, and n. (Harlan, J., concurring), amended the city charter to provide that ordinances regulating real estate transactions "'on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be

---

Appeals reversed on this issue, concluding that the District Court had abused its discretion in denying fees. The Court of Appeals determined that the School Districts fell within the language of the attorney's fees statutes, 42 U. S. C. § 1988 and 20 U. S. C. § 3205 (1976 ed., Supp. IV), see n. 31, *infra*, and it reasoned that "[a]s long as a publicly-funded organization advances important constitutional values, it is eligible for fees under the statutes." 633 F. 2d, at 1348.

effective.'" *Id.*, at 387. This action "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [fair housing] ordinance could take effect." *Id.*, at 389–390. In essence, the amendment changed the requirements for the adoption of one type of local legislation: to enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the City Council *and* of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the City Council.

In striking down the charter amendment, the *Hunter* Court recognized that, on its face, the provision "draws no distinctions among racial and religious groups." *Id.*, at 390. But it did differentiate "between those groups who sought the law's protection against racial . . . discriminatio[n] in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," *ibid.*, thus "disadvantag[ing] those who would benefit from laws barring racial . . . discriminatio[n] as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.*, at 391. In "reality," the burden imposed by such an arrangement necessarily "falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Ibid.* In effect, then, the charter amendment served as an "explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.*, at 389. This made the amendment constitutionally suspect: "the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.*, at 393 (emphasis added).

Lee v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), offers an application of the *Hunter* doctrine in a setting strikingly similar to the one now before us. That case involved the New York education system, which made use of both elected and appointed school boards and which conferred extensive authority on state education officials. In an effort to eliminate *de facto* segregation in New York's schools, those officials had directed the city of Buffalo—a municipality with an appointed school board—to implement an integration plan. While these developments were proceeding, however, the New York Legislature enacted a statute barring state education officials and appointed—though not elected—school boards from "assign[ing] or compell[ing] [students] to attend any school on account of race . . . or for the purpose of achieving [racial] equality in attendance . . . at any school." *Id.*, at 712.[13]

Applying *Hunter*, the three-judge District Court invalidated the statute, noting that under the provision "[t]he Commissioner [of Education] and local appointed officials are prohibited from acting in [student assignment] matters only where racial criteria are involved." *Id.*, at 719. In the court's view, the statute therefore "place[d] *burdens* on the implementation of educational policies designed to deal with race on the local level" by "treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools." *Ibid.* (emphasis in original). This drew an impermissible distinction "between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id.*, at 718. This Court affirmed the District Court's judgment without opinion. 402 U. S. 935 (1971).

These cases yield a simple but central principle. As Justice Harlan noted while concurring in the Court's opinion in

---

[13] As does Initiative 350, the New York statute apparently permitted voluntary student transfers to achieve integration. See n. 16, *infra*.

Hunter, laws structuring political institutions or allocating political power according to "neutral principles"—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." 393 U. S., at 394. Because such laws make it more difficult for *every* group in the community to enact comparable laws, they "provid[e] a just framework within which the diverse political groups in our society may fairly compete." *Id.*, at 393. Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," *id.*, at 391 (emphasis added), thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395 (emphasis added) (Harlan, J., concurring). Such a structuring of the political process, the Court said, was "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.*, at 391.

III

We believe that the Court of Appeals properly focused on *Hunter* and *Lee*, for we find the principle of those cases dispositive of the issue here. In our view, Initiative 350 must fall because it does "not attemp[t] to allocate governmental power on the basis of any general principle." *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.

A

Noting that Initiative 350 nowhere mentions "race" or "integration," appellants suggest that the legislation has no racial overtones; they maintain that *Hunter* is inapposite because the initiative simply permits busing for certain enumerated purposes while neutrally forbidding it for all other reasons. We find it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes. Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350. Thus, the District Court found that the text of the initiative was carefully tailored to interfere only with desegregative busing.[14] Proponents of the initiative candidly "represented that there would be no loss of school district flexibility other than in busing for desegregation purposes." 473 F. Supp., at 1008. And, as we have noted, Initiative 350 in fact allows school districts to bus their students "for most, if not all," of the nonintegrative purposes required by their educational policies. *Id.*, at 1010. The Washington electorate surely was aware of this, for it was "assured" by CiVIC officials that "'99% of the school districts in the state'"—those that lacked mandatory integration programs—"would not be affected by the passage of 350." *Id.*, at 1008–1009. It is beyond reasonable dispute, then, that the initiative was enacted "'because of,' not merely 'in spite of,' its adverse effects upon" busing for integration. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979).

Even accepting the view that Initiative 350 was enacted for such a purpose, the United States—which has changed its position during the course of this litigation, and now supports the State—maintains that busing for integration, unlike the fair housing ordinance involved in *Hunter*, is not a peculiarly "racial" issue at all. Brief for United States 17, n. 18. Again, we are not persuaded. It undoubtedly is true, as the United States suggests, that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350. And it should be equally clear that white as well as Negro children benefit from exposure to "ethnic and racial diversity in the classroom." *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 486 (1979) (POWELL, J., dissenting). See *Milliken* v. *Bradley*, 418 U. S. 717, 783 (1974) (MARSHALL, J., dissenting).[15] But neither of these factors serves to distinguish *Hunter*, for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance. Cf. *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 376–377, and n. 17 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 111, 115 (1979).

---

[14] The Court of Appeals accepted the District Court's characterization of the initiative, and even the dissenting judge in the Court of Appeals agreed that Initiative 350 addresses a "racial" problem. 633 F. 2d, at 1353.

In any event, our cases suggest that desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose. Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U. S. 437, 451 (1980) (POWELL, J., dissenting), while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage. *Columbus Board of Education* v. *Penick*, 443 U. S., at 485, n. 5 (POWELL, J., dissenting). *Lee* v. *Nyquist* settles this point, for the Court there accepted the proposition that mandatory desegregation strategies present the type of racial issue implicated by the *Hunter* doctrine.[16]

---

[15] Appellants and the United States do not challenge the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation. We therefore do not specifically pass on that issue. See generally *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43, 45 (1971). Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265, 300, n. 39, 312–314 (1978) (opinion of POWELL, J.).

It is undeniable that busing for integration—particularly when ordered by a federal court—now engenders considerably more controversy than does the sort of fair housing ordinance debated in *Hunter*. See *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U. S., at 448–451 (POWELL,

---

[16] The United States seeks to distinguish *Lee* by suggesting that the statute there at issue "clearly prohibited" all attempts to ameliorate racial imbalance in the schools, while Initiative 350 permits voluntary desegregation efforts. Brief for United States 25. Even assuming that this distinction would otherwise be of constitutional significance, its premise is not accurate. The legislation challenged in *Lee did* permit voluntary integration efforts, for it expressly exempted from its restrictions "the assignment of a pupil in the manner requested or authorized by his parents or guardian." 318 F. Supp., at 712. Thus, as the District Court in *Lee* noted, the statute "denie[d] appointed officials the power to implement *non-voluntary* programs for the improvement of racial balance." *Id.*, at 715 (emphasis added). The difficulty in *Lee*—as in this case—stemmed from the *Lee* District Court's conclusion that a voluntary program would not serve to integrate the community's schools: "Voluntary plans for achieving racial balance . . . have not had a significant impact on the problems of racial segregation in the Buffalo public schools; indeed it would appear that racial isolation is actually increasing." *Ibid.* Thus the statute challenged in *Lee* and Initiative 350 operated in precisely the same way to "deny . . . student[s] the right to attend a fully integrated school." Brief for United States 25.

J., dissenting). But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough that minorities may consider busing for integration to be "legislation that is in their interest." *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.

B

We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. Indeed, by specifically exempting from Initiative 350's proscriptions most nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action. As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.[17] In a very obvious sense, the initiative thus "disadvantages those who would benefit from laws barring" *de facto* desegregation "as against those who . . . would otherwise regulate" student assignment decisions; "the reality is that the law's impact falls on the minority." *Hunter* v. *Erickson*, 393 U. S., at 391.

---

[17] JUSTICE POWELL finds *Hunter* completely irrelevant, dismissing it with the conclusory statement that "the political system [of Washington] has *not* been redrawn or altered." *Post*, at 498 (emphasis in original). But the dissent entirely fails to address the relevance of *Hunter* to the reallocation of decisionmaking authority worked by Initiative 350. The evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was,

The state appellants and the United States, in response to this line of analysis, argue that Initiative 350 has not worked *any* reallocation of power. They note that the State necessarily retains plenary authority over Washington's system of education, and therefore they suggest that the initiative

---

rather, the comparative structural burden placed on the political achievement of minority interests. Thus, in *Hunter*, the procedures for enacting racial legislation were modified in such a way as to place effective control in the hands of the citywide electorate. Similarly here, the power to enact racial legislation has been reallocated. In each case, the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities. While JUSTICE POWELL and the United States find it crucial that the proponents of integrated schools remain free to use Washington's initiative system to further their ends, that was true in *Hunter* as well: proponents of open housing were not barred from invoking Akron's initiative procedures to repeal the charter amendment, or to enact fair housing legislation of their own. It surely is an excessively formal exercise, then, to argue that the procedural revisions at issue in *Hunter* imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by Initiative 350 does not erect comparable political obstacles. Indeed, *Hunter* would have been virtually identical to this case had the Akron charter amendment simply barred the City Council from passing any fair housing ordinance, as Initiative 350 forbids the use of virtually all mandatory desegregation strategies. Surely, however, *Hunter* would not have come out the other way had the charter amendment made *no* provision for the passage of fair housing legislation, instead of subjecting such legislation to ratification by referendum.

The United States also would note that Initiative 350's "modification of state policy [was] not the result of any unusual political procedure," Brief for United States 30, for initiatives and referenda are often used by the Washington electorate. But that observation hardly serves to distinguish this case from *Hunter*, since the fair housing charter amendment was added through the unexceptional use of Akron's initiative procedure. See 393 U. S., at 387.

amounts to nothing more than an unexceptional example of a State's intervention in its own school system. In effect, they maintain that the State functions as a "super school board," Tr. of Oral Arg. 5, 17, which typically involves itself in all areas of educational policy. And, the argument continues, if the State is the body that usually makes decisions in this area, Initiative 350 worked a simple change in policy rather than a forbidden reallocation of power. Cf. *Crawford* v. *Los Angeles Board of Education*, *post*, p. 527.

This at first glance would seem to be a potent argument, for States traditionally have been accorded the widest latitude in ordering their internal governmental processes, see *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978), and school boards, as creatures of the State, obviously must give effect to policies announced by the state legislature. But "insisting that a State may distribute legislative power as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." *Hunter* v. *Erickson*, 393 U. S., at 392. The issue here, after all, is not whether Washington has the authority to intervene in the affairs of local school boards; it is, rather, whether the State has exercised that authority in a manner consistent with the Equal Protection Clause. As the Court noted in *Hunter:* "[T]hough Akron might have proceeded by majority vote . . . on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.*, at 392–393.[18] Washington also has chosen to make use of a more complex governmental structure, and a close examination both of the Washington statutes and of the Court's decisions in related areas convinces us that *Hunter* is fully applicable here.

---

[18] Despite the force with which it is written, then, JUSTICE POWELL's essay on "the heretofore unquestioned right of a State to structure the decisionmaking authority of its government," *post*, at 493—as well as his observations on a State's right to repeal programs designed to eliminate *de facto* segregation—is largely beside the point. The State's *power* has not

At the outset, it is irrelevant that the State might have vested all decisionmaking authority in itself, so long as the political structure it in fact erected imposes comparative burdens on minority interests; that much is settled by *Hunter* and by *Lee.*[19] And until the passage of Initiative 350, Washington law in fact had established the local school board, rather than the State, as the entity charged with making decisions of the type at issue here. Like all 50 States, see Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, Washington of course is ultimately responsible for providing education within its borders, see Wash. Const., Art. IX; Wash. Rev. Code §28A.02.010 (1981); ch. 28A.41 (establishing a uniform school financing system); *Seattle School District No. 1* v. *State*, 90 Wash. 2d 476, 585 P. 2d 71 (1978), and it therefore has set certain procedural requirements and minimum educational standards to be met by each school. See, *e. g.*, §§28A.01.010, 28A.01.020 (length of school day and year); ch. 28A.27 (mandatory attendance); ch. 28A.67 (teacher qualifications); ch. 28A.05 and §§28A.58.750–28A.58.754 (curriculum). But Washington has chosen to meet its educational responsibilities primarily through "state and local officials, boards, and committees," §28A.02.020, and the responsibility to devise and tailor educational pro-

---

been questioned at any point during this litigation. The single narrow question before us is whether the State has exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests.

[19] The Court noted in *Hunter* that Akron "might have proceeded by majority vote . . . on all its municipal legislation," 393 U. S., at 392; the charter amendment was invalidated because the citizens of Akron did not reserve all power to themselves, but rather distributed it in a nonneutral manner. In *Lee*, of course, the State had unquestioned authority to vest all power over education in state officials.

grams to suit local needs has emphatically been vested in the local school boards.

Thus "each common school district board of directors" is made "accountable for the proper operation of [its] district to the local community and its electorate." § 28A.58.758(1). To this end, each school board is "vested with the *final* responsibility for the setting of policies ensuring quality in the content and extent of its educational program" (emphasis added). *Ibid.* School boards are given responsibility for, among many other things, "[e]stablish[ing] performance criteria" for personnel and programs, for assigning staff "according to board enumerated classroom and program needs," for setting requirements concerning hours of instruction, for establishing curriculum standards "relevant to the particular needs of district students or the unusual characteristics of the district," and for evaluating teaching materials. § 28A.58.758(2). School boards are generally directed to "develop a program identifying student learning objectives for their district[s]," § 28A.58.090; see also § 28A.58.092, to select instructional materials, § 28A.58.103, to stock libraries as they deem necessary, § 28A.58.104, and to initiate a variety of optional programs. See, *e. g.*, §§ 28A.34.010, 28A.35.010, 28A.58.105. School boards, of course, are given broad corporate powers. §§ 28A.58.010, 28A.58.075, 28A.59.180. Significantly for present purposes, school boards are directed to determine which students should be bused to school and to provide those students with transportation. § 28A.24.055.

Indeed, the notion of school board responsibility for local educational programs is so firmly rooted that local boards are subject to disclosure and reporting provisions specifically designed to ensure the board's "accountability" to the people of the community for "the educational programs in the school distric[t]." § 28A.58.758(3). And, perhaps most relevant here, before the adoption of Initiative 350 the Washington Supreme Court had found it within the general discretion of local school authorities to settle problems related to the denial of "equal educational opportunity."[20] *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d 445, 453, 495 P. 2d 657, 663 (1972). It therefore had squarely held that a program of desegregative busing was a proper means of furthering the school board's responsibility to "administe[r] the schools in such a way as to provide a sound education for all children." *Id.*, at 456, 495 P. 2d, at 664.[21] See *State ex rel. Citizens Against Mandatory Bussing* v. *Brooks*, 80 Wash. 2d 121, 492 P. 2d 536 (1972); *State ex rel. Lukens* v. *Spokane School District No. 81*, 147 Wash. 467, 474, 266 P. 189, 191 (1928).[22]

Given this statutory structure, we have little difficulty concluding that Initiative 350 worked a major reordering of the State's educational decisionmaking process. Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. See *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d, at 459–460, 495 P. 2d, at 666–667. After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee* v. *Nyquist*, 318 F. Supp., at 718.[23] The District Court and the Court of Appeals similarly concluded that the initiative restructured the Washington political process, and we see no reason to challenge the determinations of courts familiar with local law. Cf. *Milliken* v. *Bradley*, 418 U. S., at 769 (WHITE, J., dissenting).

---

[20] Indeed, even the State's efforts to help ensure equal opportunity in education and to encourage desegregation are cast in cooperative terms, and are designed to assist school districts in implementing programs of their choosing. See, *e. g.*, Wash. Rev. Code §§ 28A.21.010(3), 28A.21.136(1) and (3) (1981); cf. § 28A.58.245(3).

[21] The Washington Supreme Court noted: "[A]s long as the school board authorized or required students to attend schools geographically situated close to their homes, they had such a right. But the right existed only because it was given to them by the school authorities." 80 Wash. 2d, at 452, 495 P. 2d, at 662.

[22] We also note that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally. Municipalities in Washington have been given broad powers of self-government, see generally Wash. Const., Amdt. 40; Wash. Rev. Code §§ 35.22.020, 35.23.440, 35.27.370, 35.30.010 (1981); Wash. Rev. Code, Tit. 35A (Optional Municipal Code), and Washington courts specifically have held that municipalities have the power to enact antidiscrimination ordinances. See, *e. g.*, *Seattle Newspaper-Web Pressmen's Union Local No. 26* v. *Seattle*, 24 Wash. App. 462, 604 P. 2d 170 (1979). Cf. 5 E. McQuillin, Law of Municipal Corporations § 19.23, p. 425 (3d rev. ed. 1981).

That we reach this conclusion should come as no surprise, for when faced with a similar educational scheme in *Milliken*

---

[23] Throughout his dissent, JUSTICE POWELL insists that the Court has created a "vested constitutional right to local decisionmaking," *post*, at 498–499, that under our holding "the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a school district previously has adopted one of its own," *post*, at 498, n. 14, and that today's decision somehow raises doubts about "the authority of a State to abolish school boards altogether." *Post*, at 494. See also *post*, at 495, and 498–499, n. 14. These statements evidence a basic misunderstanding of our decision. Our analysis vests no rights, and has nothing to do with whether school board action predates that taken by the State. Instead, what we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process—that is, the racial nature of the way in which it structures the *process* of decisionmaking. It is evident, then, that the horribles paraded by the dissent, *post*, at 498–499, n. 14—which have nothing to do with the ability of minorities to participate in the process of self-government—are entirely unrelated to this case. It is equally clear, as we have noted at several points in our opinion, that the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner.

v. *Bradley, supra,*[24] the Court concluded that the actions of a local school board could not be attributed to the State that had created it. We there addressed the Michigan education system, which vests in the State constitutional responsibility for providing education: "'The policy of [Michigan] has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies . . . to carry out the delegated functions given [them] by the legislature.'" *Milliken* v. *Bradley*, 418 U. S., at 794 (MARSHALL, J., dissenting), quoting *School District of City of Lansing* v. *State Board of Education*, 367 Mich. 591, 595, 116 N. W. 2d 866, 868 (1962). See *Milliken* v. *Bradley*, 418 U. S., at 726, n. 5. To fulfill this responsibility, the State of Michigan provided a substantial measure of school district funding, established standards for teacher certification, determined part of the curriculum, set a minimum school term, approved bus routes and textbooks, established disciplinary procedures, and under certain circumstances had the power even to remove local school board members. See *id.*, at 795–796 (MARSHALL, J., dissenting). See also *id.*, at 726, n. 5, 727 (describing state controls over education); *id.*, at 768, and n. 4 (WHITE, J., dissenting) (same); *id.*, at 794 (MARSHALL, J., dissenting) (same).

Yet the Court, noting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," concluded that the "Michigan educational structure . . . in common with most States, provides for a large measure of local control." *Id.*, at 741–742. Relying on this analysis, the Court determined that a Michigan school board's assignment policies could not be attributed to the State, and therefore declined to permit interdistrict busing as a remedy for one school district's acts of unconstitutional segregation. If local school boards operating under a similar statutory structure are considered separate entities for purposes of constitutional adjudication when they make segregative assignment decisions, it is difficult to see why a different analysis should apply when a local board's *desegregative* policy is at issue.

---

[24] One *amicus* observes that many States employ a similar educational structure. See Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, App. 1a–10a.

In any event, we believe that the question here is again settled by *Lee*. There, state control of the educational system was fully as complete as it now is in Washington. See generally N. Y. Educ. Law §§ 305, 306, 308–310 (McKinney 1969 and Supp. 1981). The state statute under attack reallocated power over mandatory desegregation in two ways: it transferred authority from the State Commissioner of Education to local elected school boards, and it shifted authority from local appointed school boards to the state legislature.[25] When presented with this restructuring of the political process, the District Court declared that it could "conceive of no more compelling case for the application of the *Hunter* principle." 318 F. Supp., at 719. This Court of course affirmed the District Court's judgment. We see no relevant distinction between this case and *Lee;* indeed, it is difficult to imagine a more precise parallel.[26]

---

[25] When authority to initiate desegregation programs was removed from appointed school boards and from state education officials, the only body capable of exercising power over such programs was the state legislature.

[26] The United States makes only one attempt to distinguish *Lee* in this regard: *Lee* is inapposite, the United States maintains, because the statute at issue there "blocked desegregation efforts even by 'a school district subject to a pre-existing order to eliminate segregation in its schools,'" and therefore—purportedly in contrast to Initiative 350—"interfere[d] with the efforts of individual school districts to eliminate de jure segregation." Brief for United States 25, quoting *Lee* v. *Nyquist*, 318 F. Supp., at 715. If by this statement the United States seeks to place the District Court's holding and this Court's affirmance in *Lee* on the ground that the New York statute interfered with Buffalo's attempts to eliminate *de jure* segregation, its submission is simply inaccurate. At the time of the *Lee* litigation, Buffalo had *not* been found guilty of practicing intentional segregation. See *Arthur* v. *Nyquist*, 573 F. 2d 134, 137 (CA2 1978). As the

C

To be sure, "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford* v. *Los Angeles Board of Education, post,* at 539. See *Dayton Board of Education* v. *Brinkman,* 443 U. S. 526, 531, n. 5 (1979); *Hunter* v. *Erickson,* 393 U. S., at 390, n. 5. As Justice Harlan noted in *Hunter,* the voters of the polity may express their displeasure through an established legislative or referendum procedure when particular legislation "arouses passionate opposition." *Id.,* at 395 (concurring opinion). Had Akron's fair housing ordinance been defeated at a referendum, for example, "Negroes would undoubtedly [have lost] an important political battle, but they would not thereby [have been] denied equal protection." *Id.,* at 394.

Initiative 350, however, works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government. Indeed, the initiative, like the charter amendment at issue in *Hunter,* has its most pernicious effect on integration programs that do "*not* arouse extraordinary controversy." *Id.,* at 396 (emphasis in original). In such situations the initiative makes the enactment of racially beneficial legislation difficult, though the particular program involved might not have inspired opposition had it been promulgated through the usual legislative processes

---

United States notes, Buffalo was under a "pre-existing order to eliminate segregation in its schools"—but that order was issued by the New York Commissioner of Education, because he had found Buffalo's schools *de facto* segregated. *Appeal of Dixon,* 4 N. Y. Educ. Dept. Reports 115 (1965). See *Lee* v. *Nyquist,* 318 F. Supp., at 714–715. *Lee* did not concern *de jure* segregation; it is to be explained only as a straightforward application of the *Hunter* doctrine.

used for comparable legislation.[27] This imposes direct and undeniable burdens on minority interests. "If a governmental institution is to be fair, one group cannot always be expected to win," *id.*, at 394; by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage.

IV

In the end, appellants are reduced to suggesting that *Hunter* has been effectively overruled by more recent decisions of this Court. As they read it, *Hunter* applied a simple "disparate impact" analysis: it invalidated a facially neutral ordinance because of the law's adverse effects upon racial minorities. Appellants therefore contend that *Hunter* was swept away, along with the disparate-impact approach to equal protection, in *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977). Cf. *James* v. *Valtierra*, 402 U. S. 137 (1971).

Appellants unquestionably are correct when they suggest that "purposeful discrimination is 'the condition that offends the Constitution,'" *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 274, quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971), for the "central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U. S., at 239. Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations. Appellants' suggestion that this analysis somehow conflicts with *Hunter*, however, misapprehends the basis of the *Hunter* doctrine. We have not insisted on a particularized inquiry into motivation in all equal protection cases: "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 272. And legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category.[28]

---

[27] That phenomenon is graphically demonstrated by the circumstances of this litigation. The longstanding desegregation programs in Pasco and Tacoma, as well as the Seattle middle school integration plan, have functioned for years without creating undue controversy. Yet they have been swept away, along with the Seattle Plan, by Initiative 350. As a practical matter, it seems most unlikely that proponents of desegregative busing in smaller communities such as Tacoma or Pasco will be able to obtain the statewide support now needed to permit them to desegregate the schools in their communities.

There is one immediate and crucial difference between *Hunter* and the cases cited by appellants. While decisions such as *Washington* v. *Davis* and *Arlington Heights* considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities "as minorities," not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented. This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification. See *Crawford* v. *Los Angeles Board of Education, post*, p. 527. But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'"[29] *James* v. *Valtierra*, 402 U. S., at

---

[28] The State does not suggest that Initiative 350 furthers the kind of compelling interest necessary to overcome the strict scrutiny applied to explicit racial classifications.

[29] Thus we do not hold, as the dissent implies, *post*, at 494, that the State's attempt to repeal a desegregation program creates a racial classification, while "identical action" by the Seattle School Board does not. It is

141, quoting *Hunter* v. *Erickson*, 393 U. S., at 391. And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938). In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973).[30]

Hunter recognized the considerations addressed above, and it therefore rested on a principle that has been vital for over a century—that "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." 393 U. S., at 391. Just such distinctions infected the reallocation of decisionmaking authority considered in *Hunter*, for minorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups "from effective participation in the political proces[s]." *Mobile* v. *Bolden*, 446 U. S., at 94 (WHITE, J., dissenting). Certainly, a state requirement that "desegregation or antidiscrimination laws," *Crawford* v. *Los Angeles Board of Education*, *post*, at 539, and only such

---

the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan.

[30] We also note that singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation. When political institutions are more generally restructured, as JUSTICE BRENNAN has noted in another context, "[t]he very breadth of [the] scheme . . . negates any suggestion" of improper purpose. *Walz* v. *Tax Comm'n*, 397 U. S. 664, 689 (1970) (concurring opinion).

laws, be passed by unanimous vote of the legislature would be constitutionally suspect. It would be equally questionable for a community to require that laws or ordinances "designed to ameliorate race relations or to protect racial minorities," *ibid.*, be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure. The amendment addressed in *Hunter*—and, as we have explained, the legislation at issue here—was less obviously pernicious than are these examples, but was no different in principle.

V

In reaching this conclusion, we do not undervalue the magnitude of the State's interest in its system of education. Washington could have reserved to state officials the right to make all decisions in the areas of education and student assignment. It has chosen, however, to use a more elaborate system; having done so, the State is obligated to operate that system within the confines of the Fourteenth Amendment. That, we believe, it has failed to do.[31]

Accordingly, the judgment of the Court of Appeals is

Affirmed.

---

[31] Appellants also challenge the Court of Appeals' award of attorney's fees to the School District plaintiffs, see n. 12, *supra*, arguing that state-funded entities are not eligible to receive such awards from the State. In our view, this contention is without merit. The Districts are plainly parties covered by the language of the fees statutes. See 42 U. S. C. § 1988 (1976 ed., Supp. IV) ("In any action . . . to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow *the prevailing party, other than the United States*, a reasonable attorney's fee as part of its costs") (emphasis added); 20 U. S. C. § 3205 (1976 ed., Supp. IV) ("Upon the entry of a final order by a court of the United States against a . . . State . . . for failure to comply with . . . the fourteenth amendment to the Constitution of the United States as [it] pertain[s] to elementary and secondary education, the court, in its discretion . . . may allow *the prevailing party, other than the United States*, a reasonable attorney's fee as part of its costs") (emphasis added). Nothing in the history of the statutes suggests that this language was meant to exclude

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The people of the State of Washington, by a two-to-one vote, have adopted a neighborhood school policy. The policy is binding on local school districts but in no way affects the authority of state or federal courts to order school transportation to remedy violations of the Fourteenth Amendment. Nor does the policy affect the power of local school districts to establish voluntary transfer programs for racial integration or for any other purpose.

In the absence of a constitutional violation, no decision of this Court compels a school district to adopt or maintain a mandatory busing program for racial integration.[1] Accordingly, the Court does not hold that the adoption of a neighborhood school policy by *local* school districts would be unconstitutional. Rather, it holds that the adoption of such a

---

state-funded entities. To the contrary, the Courts of Appeals have held with substantial unanimity that publicly funded legal services organizations may be awarded fees. See, *e. g., Dennis* v. *Chang*, 611 F. 2d 1302 (CA9 1980); *Holley* v. *Lavine*, 605 F. 2d 638 (CA2 1979), cert. denied *sub nom. Blum* v. *Holley*, 446 U. S. 913 (1980); *Lund* v. *Affleck*, 587 F. 2d 75 (CA1 1978). And when it enacted § 1988, Congress cited with approval a decision awarding fees to a state-funded organization. See H. R. Rep. No. 94–1558, p. 8, n. 16 (1976) (citing *Incarcerated Men of Allen County Jail* v. *Fair*, 507 F. 2d 281 (CA6 1974). In any event, the underlying congressional policies are served by awarding fees in cases such as the one before us: no matter what the source of their funds, school boards have limited budgets, and allowing them fees "encourage[s] compliance with and enforcement of the civil rights laws." *Dennis* v. *Chang*, 611 F. 2d, at 1306. See *id.*, at 1306–1307. While appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment. We see no reason to disturb the judgment of the Court of Appeals on this point.

[1] Throughout this dissent, I use the term "mandatory busing" to refer to busing—or mandatory student reassignments—for the purpose of achieving racial integration.

policy at the *state* level—rather than at the local level—violates the Equal Protection Clause of the Fourteenth Amendment.

I dissent from the Court's unprecedented intrusion into the structure of a state government. The School Districts in this case were under no federal constitutional obligation to adopt mandatory busing programs. The State of Washington, the governmental body ultimately responsible for the provision of public education, has determined that certain mandatory busing programs are detrimental to the education of its children. "[T]he Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." *Hughes* v. *Superior Court*, 339 U. S. 460, 467 (1950). In my view, that Amendment leaves the States equally free to decide matters of concern to the State at the state, rather than local, level of government.

I

At the November 1978 general election, the voters of the State adopted Initiative 350 by a two-to-one majority.[2] The Initiative sets forth a neighborhood school policy binding on local school districts. It establishes a general rule prohibiting school districts from "directly or indirectly requir[ing] any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." Wash. Rev. Code § 28A.26.010 (1981). The rule may be avoided in individual instances only if the student requires special education; if there are health or safety hazards between the student's residence and the nearest or next nearest school; or if the nearby schools are overcrowded, unsafe, or lacking in physical facilities. *Ibid.*

---

[2] The Initiative passed by almost 66% of the statewide vote. In Seattle the Initiative passed by over 61% of the vote. It failed in only two of Seattle's legislative districts—one predominantly black and one predominantly white.

The Initiative includes two significant limitations upon the scope of its neighborhood school policy. It expressly provides that nothing in the Initiative shall "preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students." § 28A.26.050. Moreover, and critical to this case, the authority of state and federal courts to order mandatory school assignments to remedy constitutional violations is left untouched by the Initiative: "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." § 28A.26.060.[3]

This suit was filed in United States District Court shortly after the Initiative was enacted. The Seattle School District, joined by the Tacoma and Pasco School Districts[4] and certain individual plaintiffs, argued that the Initiative violated the Equal Protection Clause of the Fourteenth Amendment. The District Court agreed, and, in a split decision, the Court of Appeals affirmed. Relying on *Hunter* v. *Erickson*, 393 U. S. 385 (1969), the Court of Appeals concluded that Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d 1338, 1344 (CA9 1980).[5]

---

[3] Unlike the constitutional amendment at issue in *Crawford* v. *Los Angeles Board of Education*, *post*, p. 527, Initiative 350 places no limits on the state courts in their interpretation of the State Constitution. Thus, if mandatory school assignments were required by the State Constitution—although not by the Fourteenth Amendment of the Federal Constitution—Initiative 350 would not hinder a State from enforcing its Constitution.

[4] Tacoma School District No. 10 and Pasco School District No. 1 are the only other school districts in Washington with extensive integration programs. Pasco has relied upon school closings and mandatory busing to achieve racial integration in its schools. Only minority children are bused under the Pasco plan. 473 F. Supp. 996, 1002 (WD Wash. 1979). In addition to school closings, the Tacoma integration plan relies upon voluntary techniques—magnet schools and voluntary transfers.

II

The principles that should guide us in reviewing the constitutionality of Initiative 350 are well established. To begin with, we have never held, or even intimated, that absent a federal constitutional violation, a State *must* choose to treat persons differently on the basis of race. In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State would violate no federal constitutional principle. Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978).

In particular, a neighborhood school policy and a decision *not* to assign students on the basis of their race, does not offend the Fourteenth Amendment.[6] The Court has never held that there is an affirmative duty to integrate the schools in the absence of a finding of unconstitutional segregation. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 24 (1971); *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 417 (1977). Certainly there is no constitutional duty to adopt mandatory busing in the absence of such a violation. Indeed, even where desegregation is ordered because of a constitutional violation, the Court has never held that racial balance itself is a constitutional requirement. *Ibid.* And even where there have been segregated schools, once desegregation has been accomplished no further constitutional duty exists upon school boards or States to maintain integration. See *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976).

---

[5] Judge Wright dissented. In his view Initiative 350 could not be said to embody a racial classification. The Initiative does not classify individuals on the basis of their race. It simply deals with a matter bearing on race relations. Moreover, no racial classification is created because the citizens of a State favor mandatory school reassignments for some purposes but not for reasons of race. The benefits and problems associated with busing for one reason—*e. g.*, for racial integration—are not the same as for another—*e. g.*, to avoid safety hazards. Finally, Judge Wright could not understand how the exercise of authority by the State could create a racial classification. The State had not intervened by altering the legislative process in a way that burdened racial minorities. Charged by the State Constitution with the responsibility for the provision of public education, the State had simply exercised its authority to run its own school system.

Judge Wright also addressed the District Court's alternative holdings that Initiative 350 is overbroad or that it was motivated by discriminatory intent. He found no basis for either conclusion. These alternative holdings were not addressed by the Court of Appeals majority. Nor are they relied upon by the Court today. Accordingly, they are not discussed in this dissent.

[6] See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for

Moreover, it is a well-established principle that the States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978).[7] The Constitution does not dictate to the States a

---

judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes").

Indeed, in the absence of a finding of segregation by the School District, mandatory busing on the basis of race raises constitutional difficulties of its own. Extensive pupil transportation may threaten liberty or privacy interests. See *University of California Regents* v. *Bakke*, 438 U. S. 265, 300, n. 39 (1978) (opinion of POWELL, J.); *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U. S. 189, 240–250 (1973) (POWELL, J., concurring in part and dissenting in part). Moreover, when a State or school board assigns students on the basis of their race, it acts on the basis of a racial classification, and we have consistently held that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 272 (1979).

[7] "[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure." *Luther* v. *Borden*, 7 How. 1, 47 (1849). See *Community Communications Co.* v.

particular division of authority between legislature and judiciary or between state and local governing bodies. It does not define institutions of local government.

Thus, a State may choose to run its schools from the state legislature or through local school boards just as it may choose to address the matter of race relations at the state or local level. There is no constitutional requirement that the State establish or maintain local institutions of government or that it delegate particular powers to these bodies. The only relevant constitutional limitation on a State's freedom to order its political institutions is that it may not do so in a fashion designed to "plac[e] *special* burdens on racial minorities within the governmental process." *Hunter* v. *Erickson*, 393 U. S., at 391 (emphasis added).

In sum, in the absence of a prior constitutional violation, the States are under no constitutional duty to adopt integration programs in their schools, and certainly they are under no duty to establish a regime of mandatory busing. Nor does the Federal Constitution require that particular decisions concerning the schools or any other matter be made on the local as opposed to the state level. It does not require the States to establish local governmental bodies or to delegate unreviewable authority to them.

III

Application of these settled principles demonstrates the serious error of today's decision—an error that cuts deeply into the heretofore unquestioned right of a State to structure the decisionmaking authority of its government. In this case, by

---

Boulder, 455 U. S. 40, 53–54 (1982); *Sailors* v. *Board of Education*, 387 U. S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"); *United States* v. *Kagama*, 118 U. S. 375, 379 (1886) (under the Constitution, sovereign authority resides either with the States or the Federal Government, and "[t]here exist . . . but these two").

Initiative 350, the State has adopted a policy of racial neutrality in student assignments. The policy in no way interferes with the power of state or federal courts to remedy constitutional violations. And if such a policy had been adopted by any of the School Districts in this litigation there could have been no question that the policy was constitutional.[8]

The issue here arises only because the Seattle School District—in the absence of a then-established state policy—chose to adopt race-specific school assignments with extensive busing. It is not questioned that the District itself, at any time thereafter, could have changed its mind and canceled its integration program without violating the Federal Constitution. Yet this Court holds that neither the legislature nor the people of the State of Washington could alter what the District had decided.

The Court argues that the people of Washington by Initiative 350 created a racial classification, and yet must agree that identical action by the Seattle School District itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme state authority, whether in a State Constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a State to abolish school boards altogether, or to require that they conform to any lawful state policy. And in the State of Washington, a neighborhood school policy would have been lawful.

Under today's decision this heretofore undoubted supreme authority of a State's electorate is to be curtailed whenever a school board—or indeed any other state board or local instrumentality—adopts a race-specific program that arguably benefits racial minorities. Once such a program is adopted,

---

[8] The Court consistently has held that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." *Crawford* v. *Los Angeles Board of Education, post,* at 538.

only the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a State to act with respect to racial matters by subordinate bodies. It is a strange notion—alien to our system—that local governmental bodies can forever pre-empt the ability of a State—the sovereign power—to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result.

This is certainly not a case where a State—in moving to change a locally adopted policy—has established a racially discriminatory requirement. Initiative 350 does not impede enforcement of the Fourteenth Amendment. If a Washington school district should be found to have established a segregated school system, Initiative 350 will place no barrier in the way of a remedial busing order. Nor does Initiative 350 authorize or approve segregation in any form or degree. It is neutral on its face, and racially neutral as public policy. Children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "'ethnic and racial diversity in the classroom.'" *Ante*, at 472, quoting *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 486 (1979) (POWELL, J., dissenting).[9]

Finally, Initiative 350 places no "special burdens on racial minorities within the governmental process," *Hunter* v.

---

[9] The policies in support of neighborhood schooling are various but all of them are racially neutral. The people of the State legitimately could decide that unlimited mandatory busing places too great a burden on the liberty and privacy interests of families and students of all races. It might decide that the reassignment of students to distant schools, on the basis of race, was too great a departure from the ideal of racial neutrality in state action. And, in light of the experience with mandatory busing in other cities, the State might conclude that such a program ultimately would lead to greater racial imbalance in the schools. See *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U. S. 437, 451 (1980) (POWELL, J., dissenting).

Erickson, *supra*, at 391, such that interference with the State's distribution of authority is justified. Initiative 350 is simply a reflection of the State's political process at work. It does not alter that process in any respect. It does not require, for example, that all matters dealing with race—or with integration in the schools—must henceforth be submitted to a referendum of the people. Cf. *Hunter* v. *Erickson*, *supra*. The State has done no more than precisely what the Court has said that it should do: It has "resolved through the political process" the "desirability and efficacy of [mandatory] school desegregation" where there has been no unlawful segregation. *Ante*, at 474.

The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.[10]

IV

Nonetheless, the Court holds that Initiative 350 "imposes substantial and unique burdens on racial minorities" in the governmental process. See *ante*, at 470. Its authority for this holding is said to be *Hunter* v. *Erickson, supra.*[11] In *Hunter* the people of Akron passed a charter amendment that "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect." 393 U. S., at 389–390. Although the charter amendment was facially neutral, the Court found that it could be said to embody a racial classification: "[T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination." *Id.*, at 391. By making it more difficult to pass legislation in favor of racial minorities, the amendment placed "special burdens on racial minorities within the governmental process." *Ibid.*

---

[10] Cf. *James* v. *Valtierra*, 402 U. S. 137, 142 (1971) ("[O]f course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people").

Nothing in *Hunter* supports the Court's extraordinary invasion into the State's distribution of authority. Even could it be assumed that Initiative 350 imposed a burden on racial minorities,[12] it simply does not place unique political obstacles in the way of racial minorities. In this case, unlike in

---

[11] The Court also relies at certain critical points in its discussion on the summary affirmance in *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970), summarily aff'd, 402 U. S. 935 (1971). As we have often noted, however, summary affirmances by this Court are of little precedential force. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 500 (1981). A summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." *Zobel* v. *Williams*, 457 U. S. 55, 64, n. 13 (1982).

[12] It is far from clear that in the absence of a constitutional violation, mandatory busing necessarily benefits racial minorities or that it is even viewed with favor by racial minorities. See *Crawford* v. *Los Angeles Board of Education*, *post*, at 545, n. 32. As the Court indicates, the busing question is complex and is best resolved by the political process. *Ante*, at 474.

Moreover, it is significant that Initiative 350 places no limits on voluntary programs or on court-ordered reassignments. It permits school districts to order school closings for purposes of racial balance. § 28A.26.030. And it permits school districts to order a student to attend the "next nearest"—rather than nearest—school to promote racial integration.

Hunter, the political system has *not* been redrawn or altered. The authority of the State over the public school system, acting through initiative or the legislature, is plenary. Thus, the State's political system is not altered when it adopts for the first time a policy, concededly within the area of its authority, for the regulation of local school districts. And certainly racial minorities are not uniquely or comparatively burdened by the State's adoption of a policy that would be lawful if adopted by any school district in the State.[13]

Hunter, therefore, is simply irrelevant. It is the *Court* that by its decision today disrupts the normal course of State government.[14] Under its unprecedented theory of a vested constitutional right to local decisionmaking, the State apparently is now forever barred from addressing the perplexing problems of how best to educate fairly *all* children in a multiracial society where, as in this case, the local school board has acted first.[15]

---

[13] The Court repeatedly states that the effect of Initiative 350 is "to redraw decisionmaking authority over racial matters—*and only over racial matters*—in such a way as to place *comparative* burdens on minorities." *Ante*, at 475, n. 17 (emphasis added). But the decision by the State to exercise its authority over the schools and over racial matters in the schools does not place a comparative burden on racial minorities. In *Hunter*, as we have understood it, "fair housing legislation *alone* was subject to an automatic referendum requirement." *Gordon* v. *Lance*, 403 U. S. 1, 5 (1971) (emphasis added). By contrast, Initiative 350 merely places mandatory busing among the much larger group of matters—covering race relations, administration of the schools, and a variety of other matters—addressed at the state level. See n. 15, *infra*. Racial minorities, if indeed they are burdened by Initiative 350, are not *comparatively* burdened. In this respect, they are in the same position as any other group of persons who are disadvantaged by regulations drawn at the State level.

[14] The Court's decision intrudes deeply into normal state decisionmaking. Under its holding the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a school district previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. Thus, if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the dean of the law school, the faculty of the university as a whole, the university president, the chancellor of the university system, and the board of

---

regents might be powerless to intervene despite their greater authority under state law.

After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder whether—under the equal protection component of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.

[15] Even accepting the dubious notion that a State must demonstrate some past control over public schooling or race relations before now intervening in these matters, *ante*, at 477, the Court's attempt to demonstrate that Initiative 350 represents a unique thrust by the State into these areas is unpersuasive. The Court's own discussion indicates the comprehensive character of the State's activity. The Common School Provisions of the State's Code of Laws are nearly 200 pages long, governing a broad variety of school matters. The State has taken seriously its constitutional obligation to provide public education. See Wash. Const., Art. IX, § 2; *Seattle School District No. 1* v. *State*, 90 Wash. 2d 476, 518, 585 P. 2d 71, 95 (1978). In light of the wide range of regulation of the public schools by the State, it is wholly unclear what degree of prior concern or control by the State would satisfy the Court's new doctrine.

In addition to public school affairs generally, the State has taken a direct interest in ending racial discrimination in the schools and elsewhere. See Wash. Rev. Code § 49.60.010 *et seq.* (1981). Article IX, § 1, of the State Constitution specifically prohibits discrimination in public schools: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex." The State Supreme Court has not interpreted this section of the State Constitution to prohibit race-conscious school assignments in the absence of a violation of the Fourteenth Amendment. Cf. *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d 445, 495 P. 2d 657 (1972). But until today's decision one would have

V

We are not asked to decide the wisdom of a state policy that limits the ability of local school districts to adopt—on their own volition—mandatory reassignments for racial balance. We must decide only whether the Federal Constitution permits the State to adopt such a policy. The School Districts in this case were under no federal constitutional obligation to adopt mandatory busing. Absent such an obligation, the State—exercising its sovereign authority over all subordinate agencies—should be free to reject this debatable restriction on liberty. But today's decision denies this right to a State. In this case, it deprives the State of Washington of all opportunity to address the unresolved questions resulting from extensive mandatory busing.[16] The Constitution does not dictate to the States at what level of government de-

---

thought that the state court *could* have rendered such a decision without violating the Federal Constitution.

[16] Responding to this dissent, the Court denies that its opinion limits the authority of the people of the State of Washington and the legislature to control or regulate school boards. It further states that "the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner." *Ante*, at 480, n. 23. These are puzzling statements that seem entirely at odds with much of the text of the Court's opinion. It will be surprising if officials of the State of Washington—with the one exception mentioned below—will have any clear idea as to what the State now lawfully may do.

The Court does say that "[i]t is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan." *Ante*, at 485–486, n. 29. Apparently the Court is saying that, despite what else may be said in its opinion, the people of the State—or the state legislature—may repeal the *Seattle Plan*, even though neither the people nor the legislature validly may prescribe statewide standards. I perceive no logic in—and certainly no constitutional basis for—a distinction between repealing the Seattle Plan of mandatory busing and establishing a statewide policy to the same effect. The people of a State have far greater interest in the general problems associated with compelled busing for the purpose of integration than in the plan of a single school board.

cisions affecting the public schools must be taken. It certainly does not strip the States of their sovereignty. It therefore does not authorize today's intrusion into the State's internal structure.[17]

---

[17] As a former school board member for many years, I accept the privilege of a dissenting Justice to add a personal note. In my view, the local school board—responsible to the people of the district it serves—*is* the best qualified agency of a state government to make decisions affecting education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory busing program, despite my own doubts as to the educational or social merit of such a program. See *Estes* v. *Metropolitan Branches of Dallas NAACP*, 444 U. S., at 438–448 (POWELL, J., dissenting). But this case does not present a question of educational policy or even the merits of busing for racial integration. The question is one of a State's sovereign authority to structure and regulate its own subordinate bodies.

LEHMAN ON BEHALF OF HER CHILDREN, LEHMAN ET AL. *v.* LYCOMING COUNTY CHILDREN'S SERVICES AGENCY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-2177. Argued March 30, 1982—Decided June 30, 1982

Petitioner voluntarily placed her three sons in the legal custody of respondent county agency, which in turn placed them in foster homes. Thereafter, a Pennsylvania state court terminated petitioner's parental rights with respect to her sons because of parental incapacity, and the Pennsylvania Supreme Court affirmed. Petitioner then filed an action in Federal District Court, seeking a writ of habeas corpus under 28 U. S. C. § 2254(a), which requires a district court to entertain an application for such a writ in behalf "of a person in custody" pursuant to a state-court judgment in alleged violation of the Federal Constitution. She requested a declaration of the invalidity of the Pennsylvania statute under which her parental rights were terminated and an order releasing her sons to her custody. The District Court dismissed the petition on the ground that respondent's custody over petitioner's sons was not the type of custody to which § 2254(a) may be addressed. The Court of Appeals affirmed.

Held: Section 2254(a) does not confer jurisdiction on federal courts to consider collateral challenges to state-court judgments involuntarily terminating parental rights. Pp. 508–516.

(a) Although the scope of the federal writ of habeas corpus has been extended beyond that which the most literal reading of the statute might require, the writ has not been considered a generally available federal remedy for every violation of federal rights. The writ's availability has been limited to challenges to state-court judgments in situations where, as a result of a state-court criminal conviction, a petitioner has suffered substantial restraints not shared by the public generally, and the petitioner has been found to be "in custody" within the meaning of § 2254(a). Here, petitioner's children are not in the "custody" of the State in the way in which this term has been used in determining the availability of the writ of habeas corpus. They are in the "custody" of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. They suffer no restraint on liberty not shared by the public generally, cf. *Jones* v. *Cunningham*, 371 U. S. 236; *Hensley* v. *Municipal Court*, 411 U. S. 345, nor do they suffer "collateral consequences" sufficient to outweigh the need for finality, cf. *Carafas* v. *LaVallee*, 391 U. S. 234. To extend the federal writ to challenges to state child-custody decisions based on alleged constitutional defects collateral to the actual custody decision would be an unprecedented expansion of the jurisdiction of the federal courts. Pp. 508–512.

(b) Federalism and the exceptional need for finality in child-custody disputes also argue strongly against the grant of the writ here. Extended uncertainty for the children would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions. Pp. 512–514.

(c) Habeas corpus has been used in child-custody cases in many States and in England, and 28 U. S. C. § 2255, authorizing federal-court collateral review of federal decisions, *could* be construed to include the type of custody to which petitioner's children are subject. But reliance on what may be appropriate *within* the federal system or *within* a state system is of little force where, as in this case, a *state judgment* is attacked collaterally in a *federal* court. Petitioner would have the federal judicial system entertain a writ that is not time-barred to challenge collaterally a final judgment entered in a state judicial system. Pp. 514–515.

648 F. 2d 135, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 516.

Martin Guggenheim argued the cause for petitioner. With him on the brief was *Burt Neuborne*.

Charles F. Greevy III argued the cause and filed a brief for respondent.

JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether the habeas corpus statute, 28 U. S. C. § 2254, confers jurisdiction on the federal courts to consider collateral challenges to state-court judgments involuntarily terminating parental rights.

I

The facts of this case are described in detail in *In re William L.*, 477 Pa. 322, 383 A. 2d 1228, cert. denied *sub nom.*

Lehman v. *Lycoming County Children's Services*, 439 U. S. 880 (1978), the Pennsylvania Supreme Court decision terminating the parental rights of petitioner Marjorie Lehman with respect to three sons born in 1963, 1965, and 1969.[1] In 1971, Ms. Lehman discovered that she was pregnant again. Because of housing and other problems related to the care of her sons, Ms. Lehman voluntarily placed them in the legal custody of the Lycoming County Children's Services Agency, and it placed them in foster homes.

Although Ms. Lehman visited her sons monthly, she did not request their return until 1974. At that point, the Lycoming County Children's Services Agency initiated parental termination proceedings. In those proceedings, the Orphan's Court Division of the Lycoming County Court of Common Pleas heard testimony from Agency caseworkers, a psychologist, nutrition aides, petitioner, and the three sons.[2] The judge concluded: "[I]t is absolutely clear to the court that, by reason of her very limited social and intellectual development combined with her five-year separation from the children, the mother is incapable of providing minimal care, control and supervision for the three children. Her incapacity cannot and will not be remedied."[3] *In re Lehman*, Nos. 2986, 2987, and 2988, p. 4 (Ct. Common Pleas, Lycoming County, Pa., June 3, 1976).[4] The court therefore declared that petitioner's parental rights respecting the three sons were terminated.

---

[1] Petitioner has never been married. The fathers to these sons voluntarily have relinquished their parental rights in state-court proceedings.

[2] There was no evidence that any of the sons wanted to return to their mother. See Tr. 82, 117–118, 122–125, 127–129.

[3] It has now been over a decade since the sons were removed from the custody of their mother. Frank, the oldest, is now 18, and the case is moot with respect to him since he is free to seek adoption by anyone, including his natural mother. See Tr. of Oral Arg. 25–26. The other two sons, Bill and Mark, are now 12 and 16 respectively.

[4] The judge relied on the Pennsylvania statute which provides, in relevant part:

The Pennsylvania Supreme Court affirmed the termination order based on "parental incapacity, which does not involve parental misconduct." *In re William L., supra,* at 331, 383 A. 2d, at 1232. It held that the legislature's power to protect the physical and emotional needs of children authorized termination in the absence of serious harm or risk of serious harm to the children and in the absence of parental misconduct. The court stressed that, "[i]n the instant cases, the basis for termination is several years of demonstrated parental incapacity . . . ." *Ibid.* It also held that the statute was not unconstitutionally vague either on its face or as applied.

Petitioner sought this Court's review in a petition for certiorari rather than by appeal.[5] We denied the petition. *Lehman* v. *Lycoming County Children's Services,* 439 U. S. 880 (1978). Petitioner then filed the instant proceeding on January 16, 1979, in the United States District Court for the Middle District of Pennsylvania, seeking a writ of habeas cor-

---

"The rights of a parent in regard to a child may be terminated after a petition filed on any of the following grounds:

. . . . .

"(2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent." 23 Pa. Cons. Stat. § 2511(a) (1980).

[5] This decision appeared to have been a strategic one, making possible, in the event this Court did not grant plenary review, the filing of a habeas corpus petition in federal district court without any problem of res judicata on the federal issues as a result of this Court's summary affirmance or dismissal of the appeal for want of a substantial federal question. At oral argument, however, petitioner's lawyer also explained that he was confused as to whether he could appeal both the facial attack on the statute and the challenge to the statute as applied, and had therefore chosen the more conservative route of seeking a petition for a writ of certiorari on both issues. See Tr. Oral Arg. 21–22.

pus pursuant to 28 U. S. C. §§2241 and 2254. Petitioner requested (i) a declaration of the invalidity of the Pennsylvania statute under which her parental rights were terminated; (ii) a declaration that petitioner was the legal parent of the children; and (iii) an order releasing the children to her custody unless within 60 days an appropriate state court judicially determined that the best interest of the children required that temporary custody remain with the State.

The District Court dismissed the petition without a hearing. Relying primarily on *Sylvander* v. *New England Home for Little Wanderers*, 584 F. 2d 1103 (CA1 1978), the court concluded that "the custody maintained by the Respondent over the three Lehman children is not that type of custody to which the federal habeas corpus remedy may be addressed." *Lehman* v. *Lycoming County Children's Services Agency*, Civ. No. 79-65 (MD Pa. 1979), reprinted in App. to Pet. for Cert. 135a, 147a.

Sitting en banc, the Court of Appeals for the Third Circuit affirmed the District Court's order of dismissal by a divided vote of six to four. 648 F. 2d 135 (1981). No majority opinion was written. A plurality of four, in an opinion written by Judge Garth, concluded that "disputes of the nature addressed here and which essentially involve no more than the question of who shall raise a child to maturity, do not implicate the federal interest in personal liberty sufficiently to warrant the extension of federal habeas corpus." *Id.*, at 146. In support of this conclusion, Judge Garth reasoned that "[i]t is not the liberty interest of the children that is sought to be protected in such a case, but only the right of the particular parent to raise them." *Id.*, at 140 (footnote omitted).

A second plurality of four, in an opinion written by Judge Adams wrote that it "would appear to be both unwise and impolitic for the federal courts to uncover a whole new font of jurisdiction. . . ." *Id.*, at 151. He would have disposed of the case on the ground that Ms. Lehman did not have standing to assert a habeas corpus action on behalf of her children. See *id.*, at 151–155. This view was based on the conclusion that once a parent's rights have been terminated in a state proceeding, a parent is no longer presumed to represent the interest of the child. See *id.*, at 153–154.[6]

The question presented to this Court can be stated more fully as whether federal habeas corpus jurisdiction, under § 2254, may be invoked to challenge the constitutionality of a state statute under which a State has obtained custody of children and has terminated involuntarily the parental rights of their natural parent. As this is a question of importance not heretofore considered by this Court, and one over which the Circuits are divided,[7] we granted certiorari. 454 U. S. 813 (1981). We now affirm.

---

[6] Chief Judge Seitz filed a separate concurring opinion. He found the case "most difficult," noting that "the literal statutory requirements for exercise of section 2254 federal habeas corpus jurisdiction can be said to be satisfied." 648 F. 2d, at 155. But he nevertheless concurred in the result because habeas corpus has never been used to challenge state child-custody decisions, and "such a major departure from traditional uses of federal habeas corpus to challenge state-court judgments" should "await a congressional directive on the matter." *Id.*, at 156.

Judge Rosenn, joined by two other judges, dissented. He stressed that "[t]he total extinction of a familial relationship between children and their biological parents is the most drastic measure that a state can impose, short of criminal sanctions." *Id.*, at 163. Judge Gibbons also filed a dissenting opinion, arguing that there was federal subject-matter jurisdiction and that habeas corpus should be an available remedy because a decision terminating parental rights has ongoing effects. *Id.*, at 177.

[7] The federal courts have split on this issue. Only one court other than the Court of Appeals for the Third Circuit has addressed the question in a full opinion; in *Sylvander* v. *New England Home for Little Wanderers*, 584 F. 2d 1103 (1978), the Court of Appeals for the First Circuit held that habeas corpus could not be used to avoid the finality of prior state-court child-custody proceedings, with a rationale much like Judge Garth's in the instant case. Other federal courts have assumed—without full analysis—that habeas jurisdiction lies. See *Davis* v. *Page*, 640 F. 2d 599, 602 (CA5 1981) (en banc); *Rowell* v. *Oesterle*, 626 F. 2d 437 (CA5 1980).

II

A

Petitioner seeks habeas corpus collateral review by a federal court of the Pennsylvania decision. Her application was filed under 28 U. S. C. § 2254(a):

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Although the language of § 2254(a), especially in light of § 2241, suggests that habeas corpus is available only to challenge the convictions of prisoners actually in the physical custody of the State,[8] three modern cases have extended it to other situations involving challenges to state-court decisions.[9]

---

[8] See 28 U. S. C. § 2241 (empowering federal judges to grant such writs; subsection (c) provides that "[t]he writ of habeas corpus shall not extend to a *prisoner* unless . . .") (emphasis added); see also 28 U. S. C. § 2254(b) ("An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall . . . be granted unless [state remedies have not been exhausted or are not available, or there are] circumstances rendering such process ineffective to protect the rights of the *prisoner*") (emphasis added).

[9] When habeas corpus is made available by a federal court to challenge custody by *federal* entities, federalism concerns are not implicated. The only relevant question then is what federal remedy may be available. The grant of habeas relief in such instances—*e. g., Strait* v. *Laird*, 406 U. S. 341 (1972) (inactive Army Reserve member allowed to bring habeas petition to challenge his military obligation); *Brownell* v. *Tom We Shung*, 352 U. S. 180, 182–184 (1956) (alien allowed to use habeas to challenge his exclusion from the United States)—is not precedent for the use of federal habeas to challenge judgments of state courts. As Judge Garth noted in his decision below: "[T]he writ assumes even more profound implications when its operation cuts across the federal and state judicial systems. In this latter context, the writ empowers a single federal judge to overrule deter-

The first of these cases is *Jones* v. *Cunningham*, 371 U. S. 236 (1963), in which the Court allowed a parolee to challenge his conviction by a habeas petition. The Court considered the parolee in "custody" for purposes of § 2254(b) because "the custody and control of the Parole Board involve significant restraints on petitioner's liberty . . . which are in addition to those imposed by the State upon the public generally." 371 U. S., at 242. And in *Carafas* v. *LaVallee*, 391 U. S. 234 (1968), the Court allowed the writ in a challenge to a state-court judgment even though the prisoner, incarcerated at the time the writ was filed, had finished serving his sentence during the proceedings. The custody requirement had, of course, been met at the time the writ was filed, and the case was not moot because Carafas was subject to "'collateral consequences'" as a result of his conviction, *id.*, at 237, and "is suffering, and will continue to suffer, serious disabilities . . . ." *Id.*, at 239. Most recently, in *Hensley* v. *Municipal Court*, 411 U. S. 345 (1973), the Court allowed the writ to be used to challenge a state-court conviction even though the defendant had been released on his own recognizance after sentencing but prior to the commencement of his incarceration. The Court held that the defendant was in the custody of the State for purposes of § 2254(b) because he was "subject to restraints 'not shared by the public generally,'" 411 U. S., at 351 (citation omitted)—indeed, his arrest was imminent.[10]

---

minations of federal issues which have been adjudicated by the highest court of a state." 648 F. 2d, at 139.

Jurisdiction to challenge both state and federal judgments is conferred by § 2241. But § 2254, conferring general jurisdiction to consider collateral attacks on state judgments, has no relevance to *federal* habeas proceedings challenging federal custody of nonprisoners. Thus, federal decisions made pursuant to § 2241 constitute no authority for the claim of jurisdiction under § 2254 in this case.

[10] In *Hensley*, the State would have placed the petitioner behind bars, but was prevented by a stay entered by the state trial court that subse-

Thus, although the scope of the writ of habeas corpus has been extended beyond that which the most literal reading of the statute might require, the Court has never considered it a generally available federal remedy for every violation of federal rights. Instead, past decisions have limited the writ's availability to challenges to state-court judgments in situations where—as a result of a state-court criminal conviction—a petitioner has suffered substantial restraints not shared by the public generally. In addition, in each of these cases the Court considered whether the habeas petitioner was "in custody" within the meaning of § 2254.[11]

Ms. Lehman argues that her sons are involuntarily in the custody of the State for purposes of § 2254 because they are in foster homes pursuant to an order issued by a state court. Her sons, of course, are not prisoners. Nor do they suffer any restrictions imposed by a state criminal justice system. These factors alone distinguish this case from all other cases in which this Court has sustained habeas challenges to state-court judgments. Moreover, although the children have been placed in foster homes pursuant to an order of a Pennsylvania court, they are not in the "custody" of the State in the sense in which that term has been used by this Court in determining the availability of the writ of habeas corpus. They are in the "custody" of their foster parents in essentially the same way, and to the same extent, other children are in the custody of their natural or adoptive parents. Their situation in this respect differs little from the situa-

---

quently was extended by two Justices of this Court. 411 U. S., at 351. Thus, although *Hensley* held the writ to be available in a case in which there was no actual custody in a state penal institution at the time the writ was filed, the extension was in the context of a person who had a strong claim to be treated as a prisoner for jurisdictional purposes.

[11] See *Hensley*, 411 U. S., at 345 ("This case requires us to determine whether a person released on his own recognizance is 'in custody' within the meaning of the federal habeas corpus statute . . ."); *Carafas* v. *LaVallee*, 391 U. S., at 238 (similar); *Jones* v. *Cunningham*, 371 U. S., at 236 (similar).

tion of other children in the public generally; they suffer no unusual restraints not imposed on other children. They certainly suffer no restraint on liberty as that term is used in *Hensley* and *Jones*, and they suffer no "collateral consequences"—like those in *Carafas*—sufficient to outweigh the need for finality. The "custody" of foster or adoptive parents over a child is not the type of custody that traditionally has been challenged through federal habeas.[12] Ms. Lehman simply seeks to relitigate, through federal habeas, not any liberty interest of her sons, but the interest in her own parental rights.[13]

Although a federal habeas corpus statute has existed ever since 1867, federal habeas has never been available to challenge parental rights or child custody.[14] Indeed, in two cases, the Court refused to allow the writ in such instances. *Matters* v. *Ryan*, 249 U. S. 375 (1919); *In re Burrus*, 136 U. S. 586 (1890). These decisions rest on the absence of a federal question, but the opinions suggest that federal habeas corpus is not available to challenge child custody. Moreover, federal courts consistently have shown special solicitude for state interests "in the field of family and family-property arrangements." *United States* v. *Yazell*, 382 U. S. 341, 352 (1966). Under these circumstances, extending the federal writ to challenges to state child-custody decisions—challenges based on alleged constitutional defects collateral to the actual custody decision—would be an unprecedented expansion of the jurisdiction of the lower federal courts.[15]

---

[12] We express no view as to the availability of federal habeas when a child is actually confined in a state institution rather than being at liberty in the custody of a foster parent pursuant to a court order.

[13] At the hearing before the Pennsylvania trial court, petitioner's lawyer actually stated "[t]his is not a custody proceeding . . . ." Tr. 67.

[14] The Court has considered constitutional challenges to custody or parental-rights proceedings, but these cases have reached the Court on direct review of the final state-court decision, not on federal habeas. See, *e. g.*, *Santosky* v. *Kramer*, 455 U. S. 745 (1982).

JUSTICE BLACKMUN's dissenting opinion states that the legislative history, though admittedly sparse, supports its interpretation of the scope of § 2254 because "[t]he codification of the writ into federal law indicates no congressional intent to contract its common-law scope." See *post*, at 518. But the dissenting opinion cites no legislative history relevant to state-court custody decisions. Moreover, for at least 100 years after passage of the statute in 1867, the writ was not used in child-custody cases. This history strongly suggests that the extension of federal habeas corpus to state custody cases was never contemplated by Congress, nor understood by the Bar to have been an available remedy.

B

Federalism concerns and the exceptional need for finality in child-custody disputes argue strongly against the grant of Ms. Lehman's petition.[16] The writ of habeas corpus is a major exception to the doctrine of res judicata, as it allows relitigation of a final state-court judgment disposing of precisely the same claims. Because of this tension between the State's interest in finality and the asserted federal interest, federal courts properly have been reluctant to extend the writ beyond its historic purpose. As Judge Campbell noted in *Sylvander* v. *New England Home for Little Wanderers:*

---

[15] Petitioner maintains that the approval of habeas jurisdiction in this case may be limited. She suggests that it could be available only when the State takes the child away from its natural parents, but not when the State simply determines custody in a routine intrafamily dispute. It is not apparent that such distinctions are possible, either in legal theory or as a practical matter. The circumstances of custody vary widely, though in each disputed case the child is in the custody of one person—over the objections of someone else—by order of a state court. We see no principled basis for distinguishing between the claim of a natural parent and the claim of grandparents or even the claim of an unrelated person who has been given legal custody that is challenged by a third party. Moreover, the arguments of res judicata and federalism apply with equal force in every collateral attack on a state custody decision in a federal court.

[16] The dissent suggests that comity and federalism concerns cannot inform a court's construction of a statute in determining a question of jurisdiction over certain kinds of cases. *Post*, at 522–523. But in *Fair Assessment in Real Estate Assn.* v. *McNary*, 454 U. S. 100 (1981), precisely those concerns lead this Court to conclude that 42 U. S. C. § 1983 does not confer jurisdiction on the federal courts to hear suits for tax refunds when state law provides an adequate remedy.

> "Federal habeas involves a substantial thrust by the federal system into the sphere normally reserved to the states and hence a change in the federal-state balance. This is so because the federal habeas remedy, as recently fashioned, offers a federal forum regardless of what state proceedings have already taken place and in effect allows a single federal district judge to overrule the judgment of the highest state court, unfettered by the constraints of collateral estoppel and res judicata." 584 F. 2d, at 1111–1112.[17]

The State's interest in finality is unusually strong in child-custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions.[18]

---

[17] In his decision below, Judge Garth expressed similar views:

"While the ability to avoid *res judicata* is an extraordinary characteristic of habeas when the relitigation takes place within the same judicial system—that is, when a state court entertains the writ on behalf of a person in custody pursuant to the judgment of a court of that same state—the writ assumes even more profound implications when its operation cuts across the federal and state judicial systems. [T]he assumption of habeas jurisdiction by a federal court on behalf of a party complaining of a judgment rendered against him by a state court, represents an unparalleled assertion of federal authority over the state judicial system. Such an intrusion upon state judicial authority deeply implicates the principles of comity and may impair the smooth workings of our federal system.

"The awesome power of the writ to avoid *res judicata*, and its implications for our federalism, demand that its use be confined to its proper role: the preservation of individual liberty and the relief from unlawful custody." 648 F. 2d, at 139.

III

Petitioner argues that habeas corpus should be available to her because it has been used as a procedure in child-custody cases in various States and in England. She notes that, in *Jones* v. *Cunningham*, 371 U. S., at 238–240, the Court indicated that in construing the habeas statute, reference may be made to the common law and to practices in the States and in England. It is true that habeas has been used in child-custody cases in England and in many of the States. See *id.*, at 239–240, and nn. 8, 12, and 13, citing *Ford* v. *Ford*, 371 U. S. 187 (1962); *Boardman* v. *Boardman*, 135 Conn. 124, 138, 62 A. 2d 521, 528 (1948); *Ex parte Swall*, 36 Nev. 171, 174, 134 P. 96, 97 (1913); *Ex parte M'Clellan*, 1 Dowl. 81 (K. B. 1831); *Earl of Westmeath* v. *Countess of Westmeath*, as set out in reporter's footnote in *Lyons* v. *Blenkin*, 1 Jac. 245, 264, 37 Eng. Rep. 842, 848 (Ch. 1821). As these cases illustrate, the term "custody" in 28 U. S. C. § 2255—authorizing federal-court collateral review of federal decisions—could be construed to include the type of custody the Lehman children are subject to, since they are in foster homes pursuant to court orders. But reliance on what may be appropriate *within* the federal system or *within* a state system is of little force where—as in this case—a *state judgment* is attacked collaterally in a *federal* court. It is one thing to use a proceeding called "habeas corpus" in resolving child-custody disputes within a single system obligated to resolve such disputes.

---

[18] There is also the danger that "if litigation expenses mount, social workers and charitable organizations . . . may well become less willing to seek placements for children over their parents' objections, whether rational or irrational, even though in their honest judgment the child's best interests demand it." *Sylvander* v. *New England Home for Little Wanderers*, 584 F. 2d, at 1112.

The question in such a case may be which procedure is most appropriate. The system is free to set time limits on the bringing of such actions as well as to impose other requirements to ensure finality and a speedy resolution of disputes in cases involving child custody or termination of parental rights. In this case, however, petitioner would have the federal judicial system entertain a writ that is not time-barred to challenge collaterally a final judgment entered in a state judicial system. In *Sylvander* v. *New England Home for Little Wanderers*, the Court of Appeals for the First Circuit gave a compelling answer to this argument:

> "Federal habeas when applied to persons under state control is a procedure of unique potency within the federal-state framework, having far different and more far-reaching consequences than a state's utilization of habeas within its own system. State utilization of habeas to test the legal custody of a child is part of the fabric of its reserved jurisdiction over child custody matters. If a habeas remedy were not provided, some other procedure would be needed to effectuate the state's substantive interest in these relationships. It is purely a matter of procedural detail whether the remedy is called 'habeas' or something else. The federal government, however, has no parallel substantive interest in child custody matters that federal habeas would serve. The sole federal interest is in the constitutional issues collateral to such disputes. At bottom, the question is whether these constitutional issues can be adequately raised through the usual channels—appeal, certiorari and the civil rights statutes—or whether the vehicle of federal habeas, with its unique features, is required." 584 F. 2d, at 1111.

IV

The considerations in a child-custody case are quite different from those present in any prior case in which this Court has sustained federal-court jurisdiction under § 2254. The federal writ of habeas corpus, representing as it does a profound interference with state judicial systems and the finality of state decisions, should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns.[19] Congress has indicated no intention that the reach of § 2254 encompass a claim like that of petitioner. We therefore hold that § 2254 does not confer federal-court jurisdiction. The decision below, affirming the denial of a writ of habeas corpus, therefore is affirmed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Although I can sympathize with what the Court seeks to accomplish in this case today, I cannot reconcile myself to its holding that "§ 2254 does not confer federal-court jurisdiction," *ante*, this page, to consider collateral challenges to state-court judgments involuntarily terminating parental rights. In my view, the literal statutory requisites for the exercise of § 2254 federal habeas corpus jurisdiction are satisfied here—in particular, the requirement that petitioner's children must be "in custody." Because I believe the Court could have achieved much the same practical result in this area without decreeing a complete withdrawal of federal jurisdiction, I respectfully dissent.

I

Justice Black, speaking for a unanimous Court in *Jones* v. *Cunningham*, 371 U. S. 236, 243 (1963), observed that the federal writ of habeas corpus "is not now and never has been a static, narrow, formalistic remedy."

---

[19] In *Hensley*, this Court observed:

"The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." 411 U. S., at 351.

> "While limiting its availability to those 'in custody,' the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country." *Id.*, at 238.

Even a brief historical examination of common-law usages teaches two lessons: first, for centuries, the English and American common-law courts have had the undisputed *power* to issue writs of habeas corpus ordering the release of children from unlawful custody; and, second, those courts have exercised broad *discretion* in deciding whether or not to invoke that power in a given case. English common-law courts traditionally were authorized to order the release of minor children from unlawful custody.[1] Relying on the English tradition, American state courts very early asserted their own power to issue common-law habeas writs in child-custody matters. See generally Oaks, Habeas Corpus in the States—1776–1865, 32 U. Chi. L. Rev. 243, 270–274 (1965).

While acknowledging that "habeas has been used in child-custody cases in England and in many of the States," *ante*, at 514, the Court suggests that a state court derives its authority to issue a writ of habeas corpus in such disputes not from the common law, but from "'the fabric of its reserved jurisdiction over child custody matters.'" *Ante*, at 515, quoting *Sylvander* v. *New England Home for Little Wanderers*, 584 F. 2d 1103, 1111 (CA1 1978). While such a conclusion is not illogical, it is surely ahistorical. Contrary to the Court's suggestion, it is *not* "'purely a matter of procedural detail whether the [state] remedy is called "habeas" or something else.'" *Ibid.* A state court's traditional power to issue a writ of habeas corpus to free a confined child always has been derived directly from the nature of the writ, not from any reserved jurisdiction over child-custody matters.[2]

---

[1] In *King* v. *Delaval*, 3 Burr. 1434, 1436–1437, 97 Eng. Rep. 913, 914 (K. B. 1763), Lord Mansfield declared:

"In cases of writs of habeas corpus directed to private persons 'to bring up infants,' the Court is bound, ex debito justitiae, to set the infant free from an improper restraint: but they are not bound to deliver them over to any body nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them.

. . . . .

"The true rule is, 'that the Court[s] are to judge upon the circumstances of the particular case; and to give their directions accordingly.'"

The codification of the writ into federal law indicates no congressional intent to contract its common-law scope. The sparse legislative history of the predecessor statute to 28 U. S. C. § 2254, the Habeas Corpus Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385, gave "no indication whatever that the bill intended to change the general *nature* of the classical habeas jurisdiction." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 476–477 (1963) (emphasis in original).[3] Nor, since that time, has this Court ever held that the congressional purpose originally underlying the statute barred use of the federal writ to free children from unlawful state custody.[4] The Court's more recent precedents have firmly established § 2254's "in custody" requirement as its most flexible element, stressing that the test of "custody" is not present physical restraint, but whether "there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." *Jones* v. *Cunningham*, 371 U. S., at 240.

---

[2] See, *e. g.*, R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 454–521 (1858); W. Church, A Treatise of the Writ of Habeas Corpus 555–557 (1886); L. Hochheimer, A Treatise on the Law Relating to the Custody of Infants 156–162 (1887); H. Clark, The Law of Domestic Relations in the United States 578–580 (1968); Bantz, Habeas Corpus—Custody of Infant, 15 Cent. L. J. 281, 281–282 (1882) (footnote omitted) (The writ "is granted on the application of the parent, guardian or master to inquire into the legality of the restraint of the child, ward, etc.; and its object is, not to enforce a right of custody, but to remove unlawful restraint"); Hand, Habeas Corpus Proceedings for the Release of Infants, 56 Cent. L. J. 385, 388 (1903) ("Whenever the parent seeks to recover a child from any third person, the approved remedy is *habeas corpus*"); Oaks, Habeas Corpus in the States—1776–1865, 32 U. Chi. L. Rev. 243, 273 (1965).

[3] To the contrary, the legislators plainly intended to enact "a bill of the largest liberty" that would not "restrain the writ of *habeas corpus* at all" and would "enable the courts of the United States to enforce the *freedom*

Today the Court bows in the direction of this historical precedent only by leaving open the possible availability of federal habeas if a child is actually confined in a state institution, rather than in the custody of a foster parent pursuant to a court order.[5] *Ante*, at 511, n. 12. At the same time, how-

---

of the wife and children of soldiers of the United States, and *also to enforce the liberty of all persons.*" Cong. Globe, 39th Cong., 1st Sess., 4151 (1866) (remarks of Rep. Lawrence) (emphasis added).

[4] In *Wales* v. *Whitney*, 114 U. S. 564 (1885), which early delineated the forms of "custody" subject to the writ, the Court stated:

"There is no very satisfactory definition to be found in the adjudged cases of the character of the restraint or imprisonment suffered by a party applying for the writ of *habeas corpus*, which is necessary to sustain the writ. . . . Wives restrained by husbands, *children withheld from the proper parent or guardian*, persons held under arbitrary custody by private individuals, as in a madhouse, as well as those under military control, may all become proper subjects of relief by the writ of *habeas corpus.*" *Id.*, at 571 (emphasis added).

In *In re Burrus*, 136 U. S. 586 (1890), and *Matters* v. *Ryan*, 249 U. S. 375 (1919), this Court refused to permit the federal writ to be used in private child-custody disputes, stating in dictum that matters of family law are reserved for the States. As the Court correctly notes, however, *ante*, at 511–512, those cases dismissed habeas petitions for want of federal-question jurisdiction, and thus did not generally deny the federal courts power to issue writs of habeas corpus in child-custody cases.

[5] Notwithstanding their conclusions that federal habeas "jurisdiction" does not lie in child-custody cases, neither plurality opinion in the Court of

ever, the Court presents three reasons why federal courts lack "jurisdiction" to issue writs of federal habeas corpus to release children from the latter form of state custody. Not one of these reasons is sufficient to erect a *jurisdictional*, as opposed to a prudential, bar to federal habeas relief.[6]

First, the Court restrictively reads *Jones* v. *Cunningham, supra; Carafas* v. *LaVallee*, 391 U. S. 234 (1968); and *Hensley* v. *Municipal Court*, 411 U. S. 345 (1973), and deems those three cases to involve only substantial and unusual restraints suffered by individuals "as a result of a state-court *criminal conviction*." *Ante*, at 510 (emphasis added). Yet those decisions plainly drew no distinction between crim-

---

Appeals was willing to foreclose a federal court's power to issue the writ to secure a child's release from state custody under extreme circumstances. See 648 F. 2d 135, 144 (CA3 1981) (en banc) (Garth, J., announcing the judgment of the court) ("'Were [the Lehman boys] *incarcerated* in a state home, or were there other issues making this truly a struggle for liberty by one imprisoned under the aegis of the state,' the writ might well be available") (citation omitted; emphasis in original); *id.*, at 152, n. 35 (Adams, J., concurring) ("Should the children be in state custody against their will, it is even possible that habeas would be an appropriate vehicle for the legal attack"). See also *Sylvander* v. *New England Home for Little Wanderers*, 584 F. 2d 1103, 1113 (CA1 1978) (leaving open the possibility that federal habeas corpus might be available to free a child from state custody).

[6] I disagree with the Court's announcement that "no principled basis" would exist for limiting the approval of federal habeas jurisdiction in child-custody disputes. *Ante*, at 512, n. 15. When, as in this case, the State both initiates the challenged judicial proceedings *and* remains the ongoing legal custodian of the child, subject to state-court order, the state action is plainly sufficient to create "custody in violation of the Constitution . . . of the United States" for § 2254 purposes.

Intrafamily disputes, however, are ordinarily privately initiated and result in private custody. If a child's natural parents disputed custody, and a state court awarded custody to one of them, a legitimate question would arise whether that person "may fairly be said to be a state actor." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (1982). See also *Dennis* v. *Sparks*, 449 U. S. 24, 28 (1980) ("Of course, merely resorting to the courts and being on the winning side of a lawsuit does not make a party a . . . joint actor with the judge").

inal and civil detention. To the contrary, they declared in unusually broad and expansive language that the habeas writ must be widely available "as a remedy for severe restraints on individual liberty." *Hensley* v. *Municipal Court*, 411 U. S., at 351.[7] Indeed, for its interpretation of the statutory "custody" requirement, *Jones* itself expressly relied on the fact that at common law, English courts had "permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were 'not under imprisonment, restraint, or duress of any kind.'" 371 U. S., at 239, citing *Earl of Westmeath* v. *Countess of Westmeath*, as set out in a reporter's footnote in *Lyons* v. *Blenkin*, 1 Jac. 245, 264, 37 Eng. Rep. 842, 848 (Ch. 1821).

Second, the Court argues that children living with foster parents somehow are not in the State's "custody" because "they suffer no unusual restraints not imposed on other children." *Ante*, at 511. Yet because unadopted children whose ties with their natural parents have been severed are wards of the State, the State decides where they will live, reserves the right to move them to new physical settings at will, and consents to their marriage, their enlistment in the Armed Forces, as well as all major decisions regarding medical, psychiatric, and surgical treatment. See Tr. of Oral Arg. 7 and 18, citing 23 Pa. Cons. Stat. § 2521(c) (1980).

This Court has found the statutory concept of "custody" broad enough to confer jurisdiction on federal courts to hear and determine habeas applications from petitioners who have freely traveled across state borders while released on their own recognizance, *Hensley* v. *Municipal Court*, *supra*, and who are on unattached, inactive Army Reserve duty, *Strait* v. *Laird*, 406 U. S. 341 (1972). Under these precedents, I have difficulty finding that minor children, who as state wards are fully subject to state-court custody orders, are not sufficiently and peculiarly restrained to be deemed "in custody" for the purposes of the habeas corpus statute. Cf. *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 501 (1973) (opinion concurring in result); *Hensley* v. *Municipal Court*, 411 U. S., at 353 (opinion concurring in result). Equally important, "[w]ith respect to the argument, that some force or improper restraint must be used, in order to authorize the Court in removing an infant from the custody of any one," historical authorities show that "it is not necessary that any force or restraint should exist on the part of the person having the custody of the infant towards it." *Ex parte M'Clellan*, 1 Dowl. 81, 84 (K. B. 1831) (Patteson, J.). Accord: R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 455 (1858); W. Church, A Treatise of the Writ of Habeas Corpus 555 (1886).

---

[7] See *Jones* v. *Cunningham*, 371 U. S., at 243 (the "grand purpose" of the writ is "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty"); *Carafas* v. *LaVallee*, 391 U. S., at 238 (the "province" of the writ "is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person"); *Hensley* v. *Municipal Court*, 411 U. S., at 350 ("[W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements. . . . That same theme has indelibly marked our construction of the statute's custody requirement").

Third, the Court asserts that "[f]ederalism concerns and the exceptional need for finality in child-custody disputes argue strongly against the grant of Ms. Lehman's petition." *Ante*, at 512. While I am fully sensitive to these concerns, once again I cannot understand how they deprive federal courts of statutory *jurisdiction* to entertain habeas petitions. Although the Court's decisions involving collateral attack by state prisoners against state criminal convictions have recognized similar federalism and finality concerns, they have never held that those interests erect jurisdictional bars to relief. To the contrary, the Court has carefully separated the question whether federal courts have the power to issue a writ of habeas corpus from the question whether "in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power." *Francis* v. *Henderson*, 425 U. S. 536, 539 (1976). See also *Stone* v. *Powell*, 428 U. S. 465, 478, n. 11, and 495, n. 37 (1976) ("Our decision does not mean that the federal court lacks jurisdiction over such a claim . . ."); *Fay* v. *Noia*, 372 U. S. 391, 425–426 (1963).

II

As a matter of history and precedent, then, "[t]here can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case such as this. . . . The issue . . . goes rather to the appropriate exercise of that power." *Francis* v. *Henderson*, 425 U. S., at 538–539. Cf. 648 F. 2d 135, 155 (CA3 1981) (en banc) (Seitz, C. J., concurring). In my view, the difficult discretionary question in this case is whether, 11 years after petitioner voluntarily relinquished her sons to state custody and 4 years after the involuntary termination of her parental rights was affirmed on direct appeal, she remains a proper "next friend" to apply for the federal habeas writ on behalf of her natural children.

As amended in 1948, the federal habeas statute permits a third-party application for habeas relief only if it is "signed and verified by the person for whose relief it is intended or *by someone acting in his behalf*." 28 U. S. C. § 2242 (emphasis added). "But one who so signs and verifies does not thereby become the applicant"; the person under detention remains the real party in interest. *Nash ex rel. Hashimoto* v. *MacArthur*, 87 U. S. App. D. C. 268, 270, 184 F. 2d 606, 608 (1950), cert. denied, 342 U. S. 838 (1951). For that reason, the "next friend" application has been uncommonly granted, see *Weber* v. *Garza*, 570 F. 2d 511, 513–514 (CA5 1978); *United States ex rel. Bryant* v. *Houston*, 273 F. 915, 916 (CA2 1921); *United States ex rel. Funaro* v. *Watchorn*, 164 F. 152, 153 (CC SDNY 1908), and has not been made available automatically even to the natural parents of a habeas petitioner. See, *e. g.*, *Evans* v. *Bennett*, 467 F. Supp. 1108, 1110 (SD Ala. 1979). Cf. *Gilmore* v. *Utah*, 429 U. S. 1012, 1013–1014 (1976) (BURGER, C. J., concurring).

Historically, the English common-law courts permitted parents to use the habeas writ to obtain custody of a child as a way of vindicating their own rights. American common-law courts, however, soon relied on Lord Mansfield's language in *King* v. *Delaval*, see n. 1, *supra*, to resolve custody disputes initiated by way of a habeas writ in a manner best adapted to serve the welfare of the child. See Oaks, Habeas Corpus in the States—1776–1865, 32 U. Chi. L. Rev., at 270 and 274. Thus, the American common-law rule came to be that "the parent stands in court as the real party in interest, upon his natural right of parent; but he is liable to be defeated by his own wrongdoing or unfitness and by the demands and requirements of society that the well-being of the child shall be deemed paramount to the natural rights of an unworthy parent." Hand, Habeas Corpus Proceedings for the Release of Infants, 56 Cent. L. J. 385, 389 (1903).

Similarly, the federal courts have interpreted the writ as being available only to serve the best interest of the child. "'When a party comes here, using the privilege of acting on the behalf and as the next friend of infants, it is his bounden duty to show that he really acts for the benefit of the infants, and not to promote purposes of his own.'" *King* v. *McLean Asylum of Massachusetts General Hospital*, 64 F. 331, 356 (CA1 1894), quoting *Sale* v. *Sale*, 1 Beav. 586, 587, 48 Eng. Rep. 1068, 1069 (1839). "[I]n such cases the court exercises a discretion in the interest of the child to determine what care and custody are best for it in view of its age and requirements." *New York Foundling Hospital* v. *Gatti*, 203 U. S. 429, 439 (1906).[8]

---

[8] Presiding over *United States* v. *Green*, 26 F. Cas. 30 (No. 15,256) (CC RI 1824), Justice Story concluded:

"[T]he right of the father to have the custody of his infant child . . . is not on account of any absolute right of the father, but for the benefit of the

Against this historical background, then, I find most telling the Court's observation that "Ms. Lehman simply seeks to relitigate, through federal habeas, not any liberty interest of her sons, but the interest in her own parental rights." *Ante*, at 511. As the Court notes, the record reveals no evidence that any of the sons wanted to return to their natural mother. See *ante*, at 504, n. 2. Moreover, in filing her federal habeas petition, petitioner expressly did not seek to disturb the state trial court's factual findings. See Brief for Petitioner 6. Those findings made "absolutely clear . . . that, by reason of her very limited social and intellectual development combined with her five-year separation from the children, [petitioner] is incapable of providing minimal care, control and supervision for the three children. Her incapacity cannot and will not be remedied." *In re William L.*, 477 Pa. 322, 345, 383 A. 2d 1228, 1239–1240, cert. denied *sub nom. Lehman* v. *Lycoming County Children's Services*, 439 U. S. 880 (1978).

On such a record, I believe that the District Court could have found, as a discretionary matter, that petitioner had not made a sufficient showing that she acted in the interests of the children to warrant issuing her the writ as their "next friend."[9] Indeed, I believe that the common-law habeas

---

infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant in the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real permanent interests of the infant; and if the infant be of sufficient discretion it will also consult its personal wishes. . . . It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody." *Id.*, at 31–32.

[9] Petitioner's colorable claim that her own constitutional rights were infringed would not have entitled her automatically to serve as a "next friend." As Judge Adams' concurring opinion in the Court of Appeals observed:

"Even if we assume that the statute under which the termination occurred, and which survived attack in the state courts, is unconstitutional, it is corpus tradition would have supported recognition of broad district court discretion to withhold the writ in all but the most extraordinary cases, where the district court had strong reason to believe both that the conditions of the child's confinement unconstitutionally constrained that child's liberty, and that release of the child to his natural parent very likely would serve the child's best interest.

Such a ruling would not have been inconsistent with the Court's decision today, which expressly bases denial of habeas relief on a need to reserve the federal writ "for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns." *Ante*, at 516. Indeed, I cannot understand why the Court's explicit balancing approach yields a strict *jurisdictional* bar. A discretionary limit would have allowed the writ to issue only in those very rare cases that demanded its unique "capacity to . . . cut through barriers of form and procedural mazes." *Harris* v. *Nelson*, 394 U. S. 286, 291 (1969). Because the Court overrides contrary history and precedent to find that habeas jurisdiction does not lie, I dissent.

---

highly possible that Mrs. Lehman, in challenging the statute ostensibly on behalf of the children, may actually be asserting an interest that derogates from the child's interest. That is, the child's interest in a sound family environment that the state statute was intended to protect may not be properly represented by the parent's demand for family unity. . . . [W]hat is questionable here is her right to resort to a habeas petition, which can be framed only on behalf of her children." 648 F. 2d, at 154 (footnote omitted).

I disagree, however, with Judge Adams' conclusion that petitioner lacks "standing to assert [a federal habeas] action on behalf of the three children." *Id.*, at 155. As Judge Rosenn correctly responded in dissent, petitioner plainly has standing in a constitutional sense to challenge the violation of her own rights. The question here, however, is whether "Ms. Lehman may not be the best—or even a proper—relator in this action." *Id.*, at 156, n. 2. Cf. *id.*, at 154, n. 47 (Adams, J., concurring).

CRAWFORD ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 81–38. Argued March 22, 1982—Decided June 30, 1982

In a California state-court action seeking desegregation of the schools in the Los Angeles Unified School District (District), the trial court, in 1970, found *de jure* segregation in violation of both the State and Federal Constitutions and ordered the District to prepare a desegregation plan. The California Supreme Court affirmed, but based its decision solely upon the Equal Protection Clause of the State Constitution, which bars *de facto* as well as *de jure* segregation. On remand, the trial court approved a desegregation plan that included substantial mandatory pupil reassignment and busing. While the trial court was considering alternative new plans in 1979, the voters of California ratified an amendment (Proposition I) to the State Constitution which provides that state courts shall not order mandatory pupil assignment or transportation unless a federal court "would be permitted under federal decisional law" to do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. The trial court denied the District's request to halt all mandatory reassignment and busing, holding that Proposition I was not applicable in light of the court's 1970 finding of *de jure* segregation in violation of the Fourteenth Amendment. The court then ordered implementation of a revised plan that again included substantial mandatory pupil reassignment and busing. The California Court of Appeal reversed, concluding that the trial court's 1970 findings of fact would not support the conclusion that the District had violated the Federal Constitution through intentional segregation. The Court of Appeal also held that Proposition I was constitutional under the Fourteenth Amendment and barred that part of the plan requiring mandatory student reassignment and busing.

Held: Proposition I does not violate the Fourteenth Amendment. Pp. 535–545.

(a) This Court's decisions will not support the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede. Such an interpretation of that Amendment would be destructive of a State's democratic processes and of its ability to experiment in dealing with the problems of a heterogeneous population. Proposition I does not embody, expressly or implicitly, a racial classification.

The simple repeal or modification of desegregation or antidiscrimination laws, without more, does not embody a presumptively invalid racial classification. Pp. 535–540.

(b) Proposition I cannot be characterized as something more than a mere repeal. *Hunter* v. *Erickson*, 393 U. S. 385, distinguished. The State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment. Nor does Proposition I allocate governmental or judicial power on the basis of a discriminatory principle. A "dual court system"—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas. It was constitutional for the people of the State to determine that the Fourteenth Amendment's standard was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I. Pp. 540–542.

(c) Even if it could be assumed that Proposition I had a disproportionate adverse effect on racial minorities, there is no reason to differ with the state appellate court's conclusion that Proposition I in fact was not enacted with a discriminatory purpose. The purposes of the Proposition—chief among them the educational benefits of neighborhood schooling—are legitimate, nondiscriminatory objectives, and the state court characterized the claim of discriminatory intent on the part of millions of voters as but "pure speculation." Pp. 543–545.

113 Cal. App. 3d 633, 170 Cal. Rptr. 495, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 545. MARSHALL, J., filed a dissenting opinion, *post*, p. 547.

Laurence H. Tribe argued the cause for petitioners. With him on the briefs were *Fred Okrand*, *Mark D. Rosenbaum*, *Mary Ellen Gale*, *Bruce J. Ennis*, *E. Richard Larson*, and *Paul Hoffman*.

G. William Shea argued the cause for respondents. With him on the brief for respondent Board of Education of City of Los Angeles were *Peter W. James*, *David T. Peterson*, *Michael M. Johnson* and *Jerry F. Halverson*. *Cliff Fridkis* filed a brief for respondent Bustop, Inc.

Solicitor General Lee argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, and *Richard G. Wilkins*.*

JUSTICE POWELL delivered the opinion of the Court.

An amendment to the California Constitution provides that state courts shall not order mandatory pupil assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The question for our decision is whether this provision is itself in violation of the Fourteenth Amendment.

I

This litigation began almost 20 years ago in 1963, when minority students attending school in the Los Angeles Unified School District (District) filed a class action in state court

---

*Briefs of *amici curiae* urging reversal were filed by *Steven Shiffrin* for the African American Education Commission et al.; by *Louis E. Wolcher*, *Mark N. Aaronson*, *Vilma S. Martinez*, *Peter Roos*, *William L. Robinson*, and *Norman J. Chachkin* for the Lawyers' Committee for Civil Rights Under Law et al.; and by *Alan G. Marer*, *William T. Keogh*, and *Joseph Cotchett* for Margaret Tinsley et al.

Briefs of *amici curiae* urging affirmance were filed by *George Deukmejian*, Attorney General, *Willard A. Shank*, Chief Assistant Attorney General, *Richard D. Martland*, Assistant Attorney General, and *Geoffrey L. Graybill*, Deputy Attorney General, for the State of California; by *Anthony D. Blankley* for Congresswoman Bobbi Fieldler; and by *G. Kip Edwards* and *Michael D. Torpey* for the Palo Alto Unified School District.

Briefs of *amici curiae* were filed by *John H. Larson*, *James W. Briggs*, *Allan B. McKittrick*, and *Steven J. Carnevale* for the County of Los Angeles; by *Leonard Sacks*, for State Senator Alan Robbins; by *Thomas F. Casey III* for the Belmont School District et al.; by *Penn Foote* for the California Teachers Association; by *Robert H. Finch* for the Citizens Legal Defense Alliance, Inc.; by *Myron D. Alexander* for the League of Women Voters of California; by *John McTernan* and *George Slaff* for the Members of the Bar of the State of California; and by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation.

seeking desegregation of the District's schools.[1] The case went to trial some five years later, and in 1970 the trial court issued an opinion finding that the District was substantially segregated in violation of the State and Federal Constitutions. The court ordered the District to prepare a desegregation plan for immediate use. App. 139.

On the District's appeal, the California Supreme Court affirmed, but on a different basis. *Crawford* v. *Board of Education*, 17 Cal. 3d 280, 551 P. 2d 28 (1976). While the trial court had found *de jure* segregation in violation of the Fourteenth Amendment of the United States Constitution, see App. 117, 120–121, the California Supreme Court based its affirmance solely upon the Equal Protection Clause of the State Constitution.[2] The court explained that under the California Constitution "state school boards . . . bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." 17 Cal. 3d, at 290, 551 P. 2d, at 34. The court remanded to the trial court for preparation of a "reasonably feasible" plan for school desegregation. *Id.*, at 310, 551 P. 2d, at 48.[3]

---

[1] In 1980 the District included 562 schools with 650,000 students in an area of 711 square miles. In 1968 when the case went to trial, the District was 53.6% white, 22.6% black, 20% Hispanic, and 3.8% Asian and other. By October 1980 the demographic composition had altered radically: 23.7% white, 23.3% black, 45.3% Hispanic, and 7.7% Asian and other. See 113 Cal. App. 3d 633, 642, 170 Cal. Rptr. 495, 501 (1981).

[2] "The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature. We shall explain, however, that we do not rest our decision on this characterization because we continue to adhere to our conclusion in [*Jackson* v. *Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P. 2d 878 (1963)] that school boards in California bear a constitutional obligation to take reasonably feasible steps to alleviate school segregation 'regardless of its cause.'" *Crawford* v. *Board of Education*, 17 Cal. 3d, at 285, 551 P. 2d, at 30. The court explained that federal cases were not controlling:

"In focusing primarily on . . . federal decisions . . . defendant ignores a significant line of California decisions, decisions which authoritatively establish that in this state school boards do bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." *Id.*, at 290, 551 P. 2d, at 33–34.

On remand, the trial court rejected the District's mostly voluntary desegregation plan but ultimately approved a second plan that included substantial mandatory school reassignment and transportation—"busing"—on a racial and ethnic basis.[4] The plan was put into effect in the fall of 1978, but after one year's experience, all parties to the litigation were dissatisfied. See 113 Cal. App. 3d 633, 636, 170 Cal. Rptr. 495, 497 (1981). Although the plan continued in operation, the trial court began considering alternatives in October 1979.

In November 1979 the voters of the State of California ratified Proposition I, an amendment to the Due Process and

---

[3] In stating general principles to guide the trial court on remand, the State Supreme Court discussed the "busing" question: "While critics have sometimes attempted to obscure the issue, court decisions time and time again emphasized that 'busing' is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field. . . . [I]n some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable." *Id.*, at 309, 551 P. 2d, at 47. It noted as well that a state court should not intervene to speed the desegregation process so long as the school board takes "reasonably feasible steps to alleviate school segregation," *id.*, at 305, 551 P. 2d, at 45, and that "a court cannot properly issue a 'busing' order so long as a school district continues to meet its constitutional obligations." *Id.*, at 310, 551 P. 2d, at 48.

[4] The plan provided for the mandatory reassignment of approximately 40,000 students in the fourth through eighth grades. Some of these children were bused over long distances requiring daily round-trip bus rides of as long as two to four hours. In addition, the plan provided for the voluntary transfer of some 30,000 students.

Respondent Bustop, Inc., unsuccessfully sought to stay implementation of the plan. See *Bustop, Inc.* v. *Board of Education*, 439 U. S. 1380 (1978) (REHNQUIST, J., in chambers); *Bustop, Inc.* v. *Board of Education*, 439 U. S. 1384 (1978) (POWELL, J., in chambers).

Equal Protection Clauses of the State Constitution.[5] Proposition I conforms the power of state courts to order busing to that exercised by the federal courts under the Fourteenth Amendment:

> "[N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause . . . ."[6]

---

[5] Proposition I was placed before the voters following a two-thirds vote of each house of the state legislature. Cal. Const., Art. 18, § 1. The State Senate approved the Proposition by a vote of 28 to 6, the State Assembly by a vote of 62 to 17. The voters favored the Proposition by a vote of 2,433,312 (68.6%) to 1,112,923 (31.4%). The Proposition received a majority of the vote in each of the State's 58 counties and in 79 of the State's 80 assembly districts. California Secretary of State, Statement of the Vote, November 6, 1979, Election 3–4, 43–49.

[6] Proposition I added a lengthy proviso to Art. 1, § 7(a), of the California Constitution. Following passage of Proposition I, § 7 now provides, in relevant part:

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States

Following approval of Proposition I, the District asked the Superior Court to halt all mandatory reassignment and busing of pupils. App. 185. On May 19, 1980, the court denied the District's application. The court reasoned that Proposition I was of no effect in this case in light of the court's 1970 finding of *de jure* segregation by the District in violation of the Fourteenth Amendment. Shortly thereafter, the court ordered implementation of a revised desegregation plan, one that again substantially relied upon mandatory pupil reassignment and transportation.[7]

The California Court of Appeal reversed. 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (1981). The court found that the trial court's 1970 findings of fact would not support the conclusion that the District had violated the Federal Constitution through intentional segregation.[8] Thus, Proposition I

Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

. . . . .

"Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

"In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

[7] The Superior Court ordered the immediate implementation of the revised plan. The District was unsuccessful in its effort to gain a stay of the plan pending appeal. See *Board of Education* v. *Superior Court*, 448 U. S. 1343 (1980) (REHNQUIST, J., in chambers).

[8] "When the 1970 findings of the trial court are reviewed in the light of the correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found. The thrust of the

was applicable to the trial court's desegregation plan and would bar that part of the plan requiring mandatory student reassignment and transportation. Moreover, the court concluded that Proposition I was constitutional under the Fourteenth Amendment. *Id.*, at 654, 170 Cal. Rptr., at 509. The court found no obligation on the part of the State to retain a greater remedy at state law against racial segregation than was provided by the Federal Constitution. *Ibid.* The court rejected the claim that Proposition I was adopted with a discriminatory purpose. *Id.*, at 654–655, 170 Cal. Rptr., at 509.[9]

Determining Proposition I to be applicable and constitutional, the Court of Appeal vacated the orders entered by the Superior Court. The California Supreme Court denied hearing. App. to Pet. for Cert. 73a.[10] We granted certiorari. 454 U. S. 892 (1981).

---

findings of the trial court was that passive maintenance by the Board of a neighborhood school system in the face of widespread residential racial imbalance amounted to *de jure* segregation in violation of the Fourteenth Amendment. . . . But a school board has no duty under the Fourteenth Amendment to meet and overcome the effect of population movements." 113 Cal. App. 3d, at 645–646, 170 Cal. Rptr., at 503.

[9] The Court of Appeal also rejected the claim that Proposition I deprived minority children of a "vested right" to desegregated education in violation of due process. See *id.*, at 655–656, 170 Cal. Rptr., at 509–510. Petitioners no longer advance this claim.

[10] On March 16, 1981, the District directed that mandatory pupil reassignment under the Superior Court's revised plan be terminated on April 20, 1981. On that date, parents of children who had been reassigned were given the option of returning their children to neighborhood schools. According to respondent Board of Education, approximately 7,000 pupils took this option of whom 4,300 were minority students. Brief for Respondent Board of Education 10.

The state courts refused to enjoin termination of the plan. On April 17, 1981, however, the United States District Court for the Central District of California issued a temporary restraining order preventing termination of the plan. *Los Angeles NAACP* v. *Los Angeles Unified School District*, 513 F. Supp. 717. The District Court found that there was

II

We agree with the California Court of Appeal in rejecting the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede.[11] We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court.

Proposition I does not inhibit enforcement of any federal law or constitutional requirement. Quite the contrary, by its plain language the Proposition seeks only to embrace the requirements of the Federal Constitution with respect to mandatory school assignments and transportation. It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it. Moreover, even after Proposition I, the California Constitution still imposes a greater duty of desegregation than does the Federal Constitution. The state courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, whether or not there has been a finding of intentional segregation. The school districts themselves retain a state-law obligation to

---

a "fair chance" that intentional segregation by the District could be demonstrated. *Id.*, at 720. The District Court's order was vacated on the following day by the United States Court of Appeals for the Ninth Circuit. *Los Angeles Unified School District* v. *District Court*, 650 F. 2d 1004 (1981). On remand the District Court denied the District's motion to dismiss. This ruling has been certified for interlocutory appeal. See Brief for Respondent Board of Education 10, n. 4.

On September 10, 1981, the Superior Court approved a new, voluntary desegregation plan.

[11] Respondent Bustop, Inc., argues that far from doing "more" than the Fourteenth Amendment requires, the State actually violated the Amendment by assigning students on the basis of race when such assignments were not necessary to remedy a federal constitutional violation. See Brief for Respondent Bustop, Inc., 10–18. We do not reach this contention.

take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation.[12]

Nonetheless, petitioners contend that Proposition I is unconstitutional on its face. They argue that Proposition I employs an "explicit racial classification" and imposes a "race-specific" burden on minorities seeking to vindicate state-created rights. By limiting the power of state courts to enforce the state-created right to desegregated schools, petitioners contend, Proposition I creates a "dual court system" that discriminates on the basis of race.[13] They emphasize that other state-created rights may be vindicated by the state courts without limitation on remedies. Petitioners argue that the "dual court system" created by Proposition I is unconstitutional unless supported by a compelling state interest.

We would agree that if Proposition I employed a racial classification it would be unconstitutional unless necessary to further a compelling state interest. "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 272 (1979). See *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). But Proposition I does not embody a racial classification.[14] It neither says nor implies that persons are to be treated differently on account of their race. It simply forbids state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation. The benefit it seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of school boards.[15] Indeed, even if Proposition I had a racially discriminatory effect, in view of the demographic mix of the District it is not clear which race or races would be affected the most or in what way.[16] In addition, this Court previously has held that even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown.[17]

---

[12] In this respect this case differs from the situation presented in *Washington* v. *Seattle School District No. 1, ante,* p. 457.

In an opinion delivered after Proposition I was enacted, the California Supreme Court stated that "the amendment neither releases school districts from their state constitutional obligation to take reasonably feasible steps to alleviate segregation regardless of its cause, nor divests California courts of authority to order desegregation measures other than pupil school assignment or pupil transportation." *McKinny* v. *Oxnard Union High School District Board of Trustees*, 31 Cal. 3d 79, 92–93, 642 P. 2d 460, 467 (1982). Moreover, the Proposition only limits state courts when enforcing the State Constitution. Thus, the Proposition would not bar state-court enforcement of state *statutes* requiring busing for desegregation or for any other purpose. Cf. *Brown* v. *Califano*, 201 U. S. App. D. C. 235, 244, 627 F. 2d 1221, 1230 (1980) (legislation limiting power of federal agency to require busing by local school boards held constitutional in view of the "effective avenues for desegregation" left open by the legislation).

[13] "[I]t is racial discrimination in the judicial apparatus of the state, not racial discrimination in the state's schools, that petitioners challenge under the Fourteenth Amendment in this case." Brief for Petitioners 48.

---

[14] In *Hunter* v. *Erickson*, 393 U. S. 385 (1969), the Court invalidated a city charter amendment which placed a special burden on racial minorities in the political process. The Court considered that although the law was neutral on its face, "the reality is that the law's impact falls on the minority." *Id.*, at 391. In light of this reality and the distortion of the political process worked by the charter amendment, the Court considered that the amendment employed a racial classification despite its facial neutrality. In this case the elements underlying the holding in *Hunter* are missing. See *infra*.

[15] A neighborhood school policy in itself does not offend the Fourteenth Amendment. See *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes"). Cf. 20 U. S. C. § 1701: "(a) The Congress declares it to be the policy of the United States that—(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and (2) the neighborhood is the appropriate basis for determining public school assignments."

[16] In the Los Angeles School District, white students are now the racial minority, see n. 1, *supra*. Similarly, in Los Angeles County, racial minorities, including those of Spanish origin, constitute the majority of the population. See U. S. Dept. of Commerce, 1980 Census of Population and Housing, California, Advance Reports 6 (Mar. 1981).

Similarly, the Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters.[18] This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place. In *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406, 414 (1977), we found that the school board's mere repudiation of an earlier resolution calling for desegregation did not violate the Fourteenth Amendment.[19] In *Reitman* v. *Mulkey*, 387 U. S. 369, 376 (1967), and again in *Hunter* v. *Erickson*, 393 U. S. 385, 390, n. 5 (1969), we were careful to note that the laws under review did more than "mere[ly] repeal" existing antidiscrimination legislation.[20]

---

[17] See *Washington* v. *Davis*, 426 U. S. 229, 238–248 (1976); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265 (1977); *James* v. *Valtierra*, 402 U. S. 137, 141 (1971).

[18] Proposition I is not limited to busing for the purpose of racial desegregation. It applies neutrally to "pupil school assignment or pupil transportation" in general. Even so, it is clear that court-ordered busing in *excess* of that required by the Fourteenth Amendment, as one means of desegregating schools, prompted the initiation and probably the adoption of Proposition I.

[19] See *Dayton Bd. of Ed.* v. *Brinkman*, 443 U. S., at 531, n. 5 ("Racial imbalance, we noted in *Dayton I*, is not *per se* a constitutional violation, and rescission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment").

[20] In *Hunter* we noted that "we do not hold that mere repeal of an existing [antidiscrimination] ordinance violates the Fourteenth Amendment." 393 U. S., at 390, n. 5. In *Reitman* the Court held that California Proposition 14 was unconstitutional under the Fourteenth Amendment not because it repealed two pieces of antidiscrimination legislation, but because the Proposition involved the State in private racial discrimination: "Here

In sum, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.[21]

Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population. States would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice. And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities.[22] Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects.[23] Yet these would be the results of requiring a State

---

we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market." 387 U. S., at 380–381.

[21] Of course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason. See *Reitman* v. *Mulkey*, 387 U. S. 369 (1967).

[22] See *Palmer* v. *Thompson*, 403 U. S. 217, 228 (1971) ("To hold . . . that every public facility or service, once opened, constitutionally 'locks in' the public sponsor so that it may not be dropped . . . would plainly discourage the expansion and enlargement of needed services in the long run") (BURGER, C. J., concurring); *Reitman* v. *Mulkey*, *supra*, at 395 ("Opponents of state antidiscrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable") (Harlan, J., dissenting).

[23] In his dissenting opinion in *Reitman* v. *Mulkey*, *supra*, at 395, Justice Harlan remarked upon the need for legislative flexibility when dealing with the "delicate and troublesome problems of race relations." He noted:

"The lines that have been and must be drawn in this area, fraught as it is with human sensibilities and frailties of whatever race or creed, are difficult ones. The drawing of them requires understanding, patience, and to maintain legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place. Moreover, and relevant to this case, we would not interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people.

III

Petitioners seek to avoid the force of the foregoing considerations by arguing that Proposition I is not a "mere repeal." Relying primarily on the decision in *Hunter* v. *Erickson*, *supra*, they contend that Proposition I does not simply repeal a state-created right but fundamentally alters the judicial system so that "those seeking redress from racial isolation in violation of state law must be satisfied with less than full relief from a state court."[24] We do not view *Hunter* as controlling here, nor are we persuaded by petitioners' characterization of Proposition I as something more than a mere repeal.

In *Hunter* the Akron city charter had been amended by the voters to provide that no ordinance regulating real estate on the basis of race, color, religion, or national origin could take effect until approved by a referendum. As a result of the charter amendment, a fair housing ordinance, adopted by the City Council at an earlier date, was no longer effective. In holding the charter amendment invalid under the Fourteenth Amendment, the Court held that the charter amendment was not a simple repeal of the fair housing ordinance. The

---

compromise, and is best done by legislatures rather than by courts. When legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and referendum." 387 U. S., at 395–396.

[24] Tr. of Oral Arg. 6. See *id.*, at 7–8 ("The fact that a state may be free to remove a right or remove a duty, does not mean that it has the same freedom to leave the right in place but simply, in a discriminatory way we argue, provide less than full judicial remedy").

amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect." 393 U. S., at 389-390. Thus, whereas most ordinances regulating real property would take effect once enacted by the City Council, ordinances prohibiting racial discrimination in housing would be forced to clear an additional hurdle.[25] As such, the charter amendment placed an impermissible, "special burde[n] on racial minorities within the governmental process." *Id.*, at 391.[26]

Hunter involved more than a "mere repeal" of the fair housing ordinance; persons seeking antidiscrimination housing laws—presumptively racial minorities—were "singled out for mandatory referendums while no other group . . . face[d] that obstacle." *James* v. *Valtierra*, 402 U. S. 137, 142 (1971). By contrast, even on the assumption that racial minorities benefited from the busing required by state law, Proposition I is less than a "repeal" of the California Equal Protection Clause. As noted above, after Proposition I, the State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment.

Nor can it be said that Proposition I distorts the political process for racial reasons or that it allocates governmental or judicial power on the basis of a discriminatory principle. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940). Remedies appropriate in one area of legislation may not be desirable in another. The remedies available for violation of the antitrust laws, for example, are different than those available for violation of the Civil Rights Acts. Yet a "dual court system"—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas.[27] Surely it was constitutional for the California Supreme Court to caution that although "in some circumstances busing will be an appropriate and useful element in a desegregation plan," in other circumstances "its 'costs,' both in financial and educational terms, will render its use inadvisable." See n. 3, *supra*. It was equally constitutional for the people of the State to determine that the standard of the Fourteenth Amendment was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I.[28]

---

[25] "In the case before us . . . the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." 393 U. S., at 395 (Harlan, J., concurring).

[26] The *Hunter* Court noted that although "the law on its face treats Negro and white, Jew and gentile in an identical manner," *id.*, at 391, a charter amendment making it more difficult to pass antidiscrimination legislation could only disadvantage racial minorities in the governmental process.

In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States. It could have conformed its law to the Federal Constitution in every respect. That it chose to pull back only in part, and by preserving a greater right to desegregation than exists under the Federal Constitution, most assuredly does not render the Proposition unconstitutional on its face.

---

[27] Petitioners contend that Proposition I only restricts busing for the purpose of racial discrimination. The Proposition is neutral on its face, however, and respondents—as well as the State in its *amicus* brief—take issue with petitioners' interpretation of the provision.

[28] Similarly, a "dual constitution" is not established when the State chooses to go beyond the requirements of the Federal Constitution in some areas but not others. Nor is a "dual executive branch" created when an agency is given enforcement powers in one area but not in another. Cf. *Brown* v. *Califano*, 201 U. S. App. D. C. 235, 627 F. 2d 1221 (1980) (upholding federal legislation prohibiting a federal executive agency, but not local school officials or federal courts, from requiring busing).

IV

The California Court of Appeal also rejected petitioners' claim that Proposition I, if facially valid, was nonetheless unconstitutional because enacted with a discriminatory purpose. The court reasoned that the purposes of the Proposition were well stated in the Proposition itself.[29] Voters may have been motivated by any of these purposes, chief among them the educational benefits of neighborhood schooling. The court found that voters also may have considered that the extent of mandatory busing, authorized by state law, actually was aggravating rather than ameliorating the desegregation problem. See n. 1, *supra*. It characterized petitioners' claim of discriminatory intent on the part of millions of voters as but "pure speculation." 113 Cal. App. 3d, at 655, 170 Cal. Rptr., at 509.

In *Reitman* v. *Mulkey*, 387 U. S. 369 (1967), the Court considered the constitutionality of another California Proposition. In that case, the California Supreme Court had concluded that the Proposition was unconstitutional because it gave the State's approval to private racial discrimination. This Court agreed, deferring to the findings made by the California court. The Court noted that the California court was "armed . . . with the knowledge of the facts and circumstances concerning the passage and potential impact" of the Proposition and "familiar with the milieu in which that provision would operate." *Id.*, at 378. Similarly, in this case, again involving the circumstances of passage and the potential impact of a Proposition adopted at a statewide election, we see no reason to differ with the conclusions of the state appellate court.[30]

---

[29] The Proposition contains its own statement of purpose:

"[T]he Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel, resources, and protecting the environment."

Under decisions of this Court, a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose. In determining whether such a purpose was the motivating factor, the racially disproportionate effect of official action provides "an 'important starting point.'" *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 274, quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 266 (1977).

Proposition I in no way purports to limit the power of state courts to remedy the effects of intentional segregation with its accompanying stigma. The benefits of neighborhood schooling are racially neutral. This manifestly is true in Los Angeles where over 75% of the public school body is composed of groups viewed as racial minorities. See nn. 1 and 16, *supra*. Moreover, the Proposition simply removes one means of achieving the state-created right to desegregated education. School districts retain the obligation to alleviate segregation regardless of cause. And the state courts still may order desegregation measures other than pupil school assignment or pupil transportation.[31]

---

[30] Cf. *Washington* v. *Davis*, 426 U. S., at 253 ("The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts") (STEVENS, J., concurring).

[31] In *Brown* v. *Califano*, *supra*, the Court of Appeals found that a federal statute preventing the Department of Health, Education, and Welfare (HEW) from requiring busing "to a school other than the school which is nearest the student's home," 42 U. S. C. § 2000d, was not unconstitutional. HEW retained authority to encourage school districts to desegregate through other means, and the enforcement powers of the Department of Justice were left untouched. The court therefore concluded that the limits on HEW's ability to order mandatory busing did not have a discriminatory

Even if we could assume that Proposition I had a disproportionate adverse effect on racial minorities, we see no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose. See 113 Cal. App. 3d, at 654–655, 170 Cal. Rptr., at 509. In this case the Proposition was approved by an overwhelming majority of the electorate.[32] It received support from members of all races.[33] The purposes of the Proposition are stated in its text and are legitimate, nondiscriminatory objectives. In these circumstances, we will not dispute the judgment of the Court of Appeal or impugn the motives of the State's electorate.

Accordingly the judgment of the California Court of Appeal is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring.

While I join the opinion of the Court, I write separately to address what I believe are the critical distinctions between this case and *Washington* v. *Seattle School District No. 1*, *ante*, p. 457.

---

effect. And, having done so, it refused to inquire into legislative motivation: "Absent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable." 201 U. S. App. D. C., at 248, 627 F. 2d, at 1234 (footnote omitted).

[32] Cf. *Washington* v. *Davis*, *supra*, at 253 (STEVENS, J., concurring) ("It is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it").

[33] Proposition I received support from 73.9% of the voters in Los Angeles County which has a "minority" population—including persons of Spanish origin—of over 50%. California Secretary of State, Statement of the Vote, November 6, 1979, Election 3. See n. 16, *supra*. By contrast, the Proposition received its smallest percentage of the vote in Humboldt and Marin Counties which are nearly all-white in composition.

The Court always has recognized that distortions of the political process have special implications for attempts to achieve equal protection of the laws. Thus the Court has found particularly pernicious those classifications that threaten the ability of minorities to involve themselves in the process of self-government, for if laws are not drawn within a "just framework," *Hunter* v. *Erickson*, 393 U. S. 385, 393 (1969) (Harlan, J., concurring), it is unlikely that they will be drawn on just principles.

The Court's conclusion in *Seattle* followed inexorably from these considerations. In that case the statewide electorate reallocated decisionmaking authority to "'mak[e] it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.'" *Washington* v. *Seattle School District No. 1*, *ante*, at 470 (emphasis in original), quoting *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). The Court found such a political structure impermissible, recognizing that if a class cannot participate effectively in the process by which those rights and remedies that order society are created, that class necessarily will be "relegated, by state fiat, in a most basic way to second-class status." *Plyler* v. *Doe*, 457 U. S. 202, 233 (1982) (BLACKMUN, J., concurring).

In my view, something significantly different is involved in this case. State courts do not create the rights they enforce; those rights originate elsewhere—in the state legislature, in the State's political subdivisions, or in the state constitution itself. When one of those rights is repealed, and therefore is rendered unenforceable in the courts, that action hardly can be said to restructure the State's decisionmaking mechanism. While the California electorate may have made it more difficult to achieve desegregation when it enacted Proposition I, to my mind it did so not by working a structural change in the political *process* so much as by simply repealing the right to invoke a judicial busing remedy. Indeed, ruling for petitioners on a *Hunter* theory seemingly would mean that statutory affirmative-action or antidiscrimination programs never could be repealed, for a repeal of the enactment would mean that enforcement authority previously lodged in the state courts was being removed by another political entity.

In short, the people of California—the same "entity" that put in place the State Constitution, and created the enforceable obligation to desegregate—have made the desegregation obligation judicially unenforceable. The "political process or the decisionmaking mechanism used to *address* racially conscious legislation" has not been "singled out for peculiar and disadvantageous treatment," *Washington* v. *Seattle School District No. 1, ante,* at 485 (emphasis in original), for those political mechanisms that create and repeal the rights ultimately enforced by the courts were left entirely unaffected by Proposition I. And I cannot conclude that the repeal of a state-created right—or, analogously, the removal of the judiciary's ability to enforce that right—"'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.'" *Ante,* at 486, quoting *United States* v. *Carolene Products Co.,* 304 U. S. 144, 153, n. 4 (1938).

Because I find *Seattle* distinguishable from this case, I join the opinion and judgment of the Court.

JUSTICE MARSHALL, dissenting.

The Court today addresses two state ballot measures, a constitutional amendment and a statutory initiative, each of which is admittedly designed to substantially curtail, if not eliminate, the use of mandatory student assignment or transportation as a remedy for *de facto* segregation. In *Washington* v. *Seattle School District No. 1, ante,* p. 457 *(Seattle),* the Court concludes that Washington's Initiative 350, which effectively prevents school boards from ordering mandatory school assignment in the absence of a finding of *de jure* segregation within the meaning of the Fourteenth Amendment, is unconstitutional because "it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." *Seattle*, *ante*, at 470. Inexplicably, the Court simultaneously concludes that California's Proposition I, which effectively prevents a state court from ordering the same mandatory remedies in the absence of a finding of *de jure* segregation, *is* constitutional because "having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States." *Ante*, at 542. Because I fail to see how a fundamental redefinition of the governmental decisionmaking structure with respect to the same racial issue can be unconstitutional when the State seeks to remove the authority from local school boards, yet constitutional when the State attempts to achieve the same result by limiting the power of its courts, I must dissent from the Court's decision to uphold Proposition I.

I

In order to understand fully the implications of the Court's action today, it is necessary to place the facts concerning the adoption of Proposition I in their proper context. Nearly two decades ago, a unanimous California Supreme Court declared that "[t]he segregation of school children into separate schools because of their race, even though the physical facilities and the methods and quality of instruction in the several schools may be equal, deprives the children of the minority group of equal opportunities for education and denies them equal protection and due process of the law." *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 880, 382 P. 2d 878, 880–881 (1963). Recognizing that the "right to an equal opportunity for education and the harmful consequences of segregation" do not differ according to the *cause* of racial isolation, the California Supreme Court declined to adopt the distinction between *de facto* and *de jure* segregation engrafted by this Court on the Fourteenth Amendment. *Id.*, at 881, 382 P. 2d, at 881–882. Instead, the court clearly held that "school boards [must] take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." *Id.*, at 881, 382 P. 2d, at 882.

As the California Supreme Court subsequently explained, the duty established in *Jackson* does not require that "each school in a district . . . reflect the racial composition of the district as a whole." *Crawford* v. *Board of Education*, 17 Cal. 3d 280, 302, 551 P. 2d 28, 42 (1976) *(Crawford I)*. Rather, it is sufficient that school authorities "take reasonable and feasible steps to eliminate *segregated* schools, i. e., schools in which the minority student enrollment is so disproportionate as realistically to isolate minority students from other students and thus deprive minority students of an integrated educational experience." *Id.*, at 303, 551 P. 2d, at 43 (emphasis in original). Moreover, the California courts have made clear that the primary responsibility for implementing this state constitutional duty lies with local school boards. "[S]o long as a local school board initiates and implements reasonably feasible steps to alleviate school segregation in its district, and so long as such steps produce meaningful progress in the alleviation of such segregation, and its harmful consequences, . . . the judiciary should [not] intervene in the desegregation process." *Id.*, at 305–306, 551 P. 2d, at 45. If, however, a school board neglects or refuses to implement meaningful programs designed to bring about an end to racial isolation in the public schools, "the court is left with no alternative but to intervene to protect the constitutional rights of minority children." *Id.*, at 307, 551 P. 2d, at 45. When judicial intervention is necessary, the court "may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure meaningful progress to alleviate the harmful consequences of school segregation in the district." *Id.*, at 307, 551 P. 2d, at 46. Moreover, "once a school board defaults in its constitutional task, the court, in devising a remedial order, is not precluded from requiring the busing of children as part of a reasonably feasible desegregation plan." *Id.*, at 310, 551 P. 2d, at 48.

Like so many other decisions protecting the rights of minorities, California's decision to eradicate the evils of segregation regardless of cause has not been a popular one. In the nearly two decades since the State Supreme Court's decision in *Jackson*, there have been repeated attempts to restrain school boards and courts from enforcing this constitutional guarantee by means of mandatory student transfers or assignments. In 1970, shortly after the San Francisco Unified School District voluntarily adopted a desegregation plan involving mandatory student assignment, the California Legislature enacted Education Code § 1009.5, Cal. Educ. Code Ann. § 1009.5, currently codified at Cal. Educ. Code Ann. § 35350 (West 1978), which provides that "[n]o governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." In *San Francisco Unified School District* v. *Johnson*, 3 Cal. 3d 937, 479 P. 2d 669 (1971), the California Supreme Court interpreted this provision only to bar a school district from compelling students, without parental consent, to use means of transportation furnished by the district. Construing the statute to prohibit nonconsensual assignment of students for the purpose of eradicating *de jure* or *de facto* segregation, the court concluded, would clearly violate both the State and the Federal Constitutions by "exorcising a method that in many circumstances is the sole and exclusive means of eliminating racial segregation in the schools." *Id.*, at 943, 479 P. 2d, at 671.

The very next year, opponents of mandatory student assignment for the purpose of achieving racial balance again attempted to eviscerate the state constitutional guarantee recognized in *Jackson*. Proposition 21, which was enacted by referendum in November 1972, stated that "[n]o public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school." Predictably, the California Supreme Court struck down Proposition 21 "for the same reasons set forth by us in *Johnson*." *Santa Barbara School District* v. *Superior Court*, 13 Cal. 3d 315, 324, 530 P. 2d 605, 613 (1975).

Finally, in 1979, the people of California enacted Proposition I. That Proposition, like all of the previous initiatives, effectively deprived California courts of the ability to enforce the state constitutional guarantee that minority children will not attend racially isolated schools by use of what may be "the sole and exclusive means of eliminating racial segregation in the schools," *San Francisco Unified School District* v. *Johnson*, *supra*, at 943, 479 P. 2d, at 671, mandatory student assignment and transfer. Unlike the earlier attempts to accomplish this objective, however, Proposition I does not purport to prevent mandatory assignments and transfers when such measures are predicated on a violation of the Federal Constitution. Therefore, the only question presented by this case is whether the fact that mandatory transfers may still be made to vindicate federal constitutional rights saves this initiative from the constitutional infirmity presented in the previous attempts to accomplish this same objective. In my view, the recitation of the obvious—that a state constitutional amendment does not override federal constitutional guarantees—cannot work to deprive minority children in California of their federally protected right to the equal protection of the laws.

II

A

In *Seattle*, the Court exhaustively set out the relevant principles that control the present inquiry. We there found that a series of precedents, exemplified by *Hunter* v. *Erickson*, 393 U. S. 385 (1969), and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), establish that the Fourteenth Amendment prohibits a State from allocating "governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Seattle*, *ante*, at 470 (emphasis in original). We concluded that "state action of this kind . . . 'places *special* burdens on racial minorities within the governmental process' . . . thereby 'making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.'" *Ibid.* (emphasis in original), quoting *Hunter* v. *Erickson*, *supra*, at 391, 395 (Harlan, J., concurring).

It is therefore necessary to determine whether Proposition I works a "nonneutral" reallocation of governmental power on the basis of the racial nature of the decision. This determination is also informed by our decision in *Seattle*. In that case we were presented with a statewide initiative which effectively precluded local school boards from ordering mandatory student assignment or transfer except where required to remedy a constitutional violation. We concluded that the initiative violated the Fourteenth Amendment because it reallocated decisionmaking authority over racial issues from the local school board to a "new and remote level of government." *Seattle*, *ante*, at 483. In reaching this conclusion, we specifically affirmed three principles that are particularly relevant to the present inquiry.

First, we rejected the State's argument that a statewide initiative prohibiting mandatory student assignment has no "racial overtones" simply because it does not mention the words "race" or "integration." *Seattle*, *ante*, at 471. We noted that "[n]either the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350." *Ibid.* In light of its language and the history surrounding its adoption, we found it "beyond reasonable dispute . . . that the initiative was enacted '"because of," not merely "in spite of," its adverse effects upon' busing for integration." *Ibid.*, quoting *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979). Moreover, we rejected the Solicitor General's remarkable contention, a contention also pressed here, that "busing for integration . . . is not a peculiarly 'racial' issue at all." *Seattle*, *ante*, at 471–472. While not discounting the value of an integrated education to nonminority students, we concluded that *Lee* v. *Nyquist*, *supra*, definitively established that "desegregation of the public schools . . . at bottom inures primarily to the benefit of the minority, and is designed for that purpose," thereby bringing it within the *Hunter* doctrine. *Seattle*, *ante*, at 472.

Second, the *Seattle* Court determined that Initiative 350 unconstitutionally reallocated power from local school boards to the state legislature or the statewide electorate. After the enactment of Initiative 350, local school boards continued to exercise considerable discretion over virtually all educational matters, including student assignment. Those seeking to eradicate *de facto* segregation, however, were forced to "surmount a considerably higher hurdle than persons seeking comparable legislative action," *Seattle*, *ante*, at 474, for instead of seeking relief from the local school board, those pursuing this racial issue were forced to appeal to a different and more remote level of government. Just as in *Hunter* v. *Erickson*, *supra*, where those interested in enacting fair housing ordinances were compelled to gain the support of a majority of the electorate, we held that this reallocation of governmental power along racial lines offends the Equal Protection Clause. Our holding was not altered by the fact that those seeking to combat *de facto* segregation could still pursue their cause by petitioning local boards to enact voluntary measures or by seeking action from the state legislature. Nor were we persuaded by the argument that no transfer of power had occurred because the State was ultimately responsible for the educational policy of local school boards. We found it sufficient that Initiative 350 had deprived those seeking to redress a racial harm of the right to seek a particularly effective form of redress from the level of government ordinarily empowered to grant the remedy.

Finally, the Court's decision in *Seattle* implicitly rejected the argument that state action that reallocates governmental power along racial lines can be immunized by the fact that it specifically leaves intact rights guaranteed by the Fourteenth Amendment. The fact that mandatory pupil reassignment was still available as a remedy for *de jure* segregation did not alter the conclusion that an unconstitutional reallocation of power had occurred with respect to those seeking to combat *de facto* racial isolation in the public schools.

B

In my view, these principles inexorably lead to the conclusion that California's Proposition I works an unconstitutional reallocation of state power by depriving California courts of the ability to grant meaningful relief to those seeking to vindicate the State's guarantee against *de facto* segregation in the public schools. Despite Proposition I's apparent neutrality, it is "beyond reasonable dispute," *Seattle*, *ante*, at 471, and the majority today concedes, that "court-ordered busing in *excess* of that required by the Fourteenth Amendment . . . prompted the initiation and probably the adoption of Proposition I." *Ante*, at 538, n. 18 (emphasis in original).[1] Because "minorities may consider busing for integration to be 'legislation that is in their interest,'" *Seattle*, *ante*, at 474, quoting

---

[1] Just as in *Seattle*, the fact that other types of student transfers conceivably might be prohibited does not alter this conclusion: "Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by" Proposition I. *Seattle*, *ante*, at 471. Indeed in their response to the petition for certiorari, respondents characterized Proposition I as addressing but "one narrow area: the power of a state court to order mandatory student assignment or transportation as a desegregation remedy." Brief in Opposition 9.

Hunter v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring), Proposition I is sufficiently "racial" to invoke the *Hunter* doctrine.[2]

Nor can there be any doubt that Proposition I works a substantial reallocation of state power. Prior to the enactment of Proposition I, those seeking to vindicate the rights enumerated by the California Supreme Court in *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 382 P. 2d 878 (1963), just as those interested in attaining any other educational objective, followed a two-stage procedure. First, California's minority community could attempt to convince the local school board voluntarily to comply with its constitutional obligation to take reasonably feasible steps to eliminate racial isolation in the public schools. If the board was either unwilling or unable to carry out its constitutional duty, those seeking redress could petition the California state courts to require school officials to live up to their obligations. Busing could be required as part of a judicial remedial order. *Crawford I*, 17 Cal. 3d, at 310, 551 P. 2d, at 48.

Whereas Initiative 350 attempted to deny minority children the first step of this procedure, Proposition I eliminates by fiat the second stage: the ability of California courts to order meaningful compliance with the requirements of the State Constitution. After the adoption of Proposition I, the only method of enforcing against a recalcitrant school board the state constitutional duty to eliminate racial isolation is to petition either the state legislature or the electorate as a whole. Clearly, the rules of the game have been significantly changed for those attempting to vindicate this state constitutional right.[3]

---

[2] It is therefore irrelevant whether the "benefits of neighborhood schooling are racially neutral," as the majority asserts. *Ante*, at 544; see *ante*, at 537. In *Seattle*, *ante*, at 472, we specifically rejected the argument that because some minorities as well as whites supported the initiative, it could not be considered a racial classification.

The majority seeks to conceal the unmistakable effects of Proposition I by calling it a "mere repeal" of the State's earlier commitment to do "'more' than the Fourteenth Amendment requires." *Ante*, at 535. Although it is true that we have never held that the "mere repeal of an existing [antidiscrimination] ordinance violates the Fourteenth Amendment," *Hunter* v. *Erickson*, *supra*, at 390, n. 5, it is equally clear that the reallocation of governmental power created by Proposition I is not a "mere repeal" within the meaning of any of our prior decisions.

In *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406 (1977), the new members of the Dayton Board of Education repudiated a resolution drafted by their predecessors admitting the Board's role in the establishment of a segregated school system and calling for various remedial actions. In concluding that the Board was constitutionally permitted to withdraw its own prior *mea culpa*, this Court was careful to note that *"[t]he Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs."* *Id.*, at 413 (emphasis added). Therefore, the only time that this Court has squarely held that a "mere repeal" did not violate the Fourteenth Amendment, it was presented with a situation where a governmental entity rescinded *its own* prior statement of policy without affecting any existing educational policy. It is no surprise that such conduct passed constitutional muster.

---

[3] There can be no question that the practical effect of Proposition I will be to deprive state courts of "the sole and exclusive means of eliminating racial segregation in the schools." *San Francisco Unified School District* v. *Johnson*, 3 Cal. 3d 937, 943, 479 P. 2d 669, 671 (1971). As we have often noted, "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." *North Carolina Board of Ed.* v. *Swann*, 402 U. S. 43, 46 (1971). Moreover, Proposition I prevents a state court from ordering school officials to take any action respecting *pupil school assignment*, as well as pupil transportation. Presumably, state courts could not design a remedy involving the "pairing" or "clustering" of schools, even if such a remedy did not involve *any* "busing." In the present case, the state trial court found that the voluntary programs proposed by the Los Angeles School Board were "constitutionally suspect" because they "place[d] the burden of relieving the racial isolation of the minority student upon the minority student." App. 160. Consequently, since "a voluntary program would not serve to integrate the community's schools," *Seattle*, *ante*, at 473, n. 16, Proposition I, like the measures at issue in *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), and *Seattle*, precludes the effective enjoyment by California's minority children of their right to eliminate racially isolated schools.

By contrast, in *Seattle*, *Hunter*, and *Reitman* v. *Mulkey*, 387 U. S. 369 (1967),[4] the three times that this Court has explicitly rejected the argument that a proposed change constituted a "mere repeal" of an existing policy, the alleged rescission was accomplished by a governmental entity other than the entity that had taken the initial action, and resulted in a drastic alteration of the substantive effect of existing policy. This case falls squarely within this latter category. To be sure, the *right* to be free from racial isolation in the public schools remains unaffected by Proposition I. See *ante*, at 535–536; see *McKinny* v. *Oxnard Union High School District Board of Trustees*, 31 Cal. 3d 79, 92–93, 642 P. 2d 460, 467 (1982). But Proposition I does repeal the power of the state court to *enforce* this existing constitutional guarantee through the use of mandatory pupil assignment and transfer.

The majority asserts that the Fourteenth Amendment does not "require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." *Ante*, at 540. A state court's authority to order appropriate remedies for state constitutional violations, however, is no more based on the "final authority" of the people than the power of the local Seattle School Board to make decisions regarding pupil assignment is premised on the State's ultimate control of the educational process. Rather, the authority of California courts to order mandatory student assignments in this context springs from the same source as the authority underlying other remedial measures adopted by state and federal courts in the absence of statutory authorization: the "courts power to provide equitable relief" to remedy a constitutional violation. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 30 (1971); *Crawford I*, 17 Cal. 3d, at 307, 551 P. 2d, at 46 ("a trial court may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure meaningful progress to alleviate . . . school segregation"). Even assuming that the source of a court's power to remedy a constitutional violation can be traced back to "the people," the majority's conclusion that "the people" can therefore confer that remedial power on a discriminatory basis is plainly inconsistent with our prior decisions. In *Hunter* v. *Erickson*, 393 U. S., at 392, we struck down the referendum at issue even though the people of Akron, Ohio, undoubtedly retained "final authority" for all legislation. Similarly, in *Seattle* we concluded that the reallocation of power away from local school boards offended the Equal Protection Clause even though the State of Washington "is ultimately responsible for providing education within its borders." *Ante*, at 477. The fact that this change was enacted through popular referendum, therefore, cannot immunize it from constitutional review. See *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 736–737 (1964).

---

[4] In *Reitman* v. *Mulkey*, this Court struck down another California ballot measure, granting every resident the absolute constitutional right to sell or rent his property to whomever he or she chooses. We held that the provision amounted to an unconstitutional authorization of private discrimination.

As in *Seattle*, *Hunter*, and *Reitman*, Proposition I's repeal of the state court's enforcement powers was the work of an independent governmental entity, and not of the state courts themselves. That this repeal drastically alters the substantive rights granted by existing policy is patently obvious from the facts of this litigation.[5] By prohibiting California courts from ordering mandatory student assignment when necessary to eliminate racially isolated schools, Proposition I has placed an enormous barrier between minority children and the effective enjoyment of their constitutional rights, a barrier that is not placed in the path of those who seek to vindicate other rights granted by state law. This Court's precedents demonstrate that, absent a compelling state interest, which respondents have hardly demonstrated, such a discriminatory barrier cannot stand.[6]

---

[5] Indeed Proposition I by its express terms allows for the modification of existing plans upon the application of any interested person. Art. 1, § 7(a).

[6] As the majority notes, Proposition I states that the "people of the State of California find and declare that this amendment is necessary to serve compelling public interests," including, *inter alia*, "making the most efficient use of . . . limited financial resources," protecting the "health and safety" of all students, preserving "harmony and tranquility," and "protecting the environment." *Ante*, at 533, n. 6. These purported justifications, while undoubtedly meritorious, are clearly insufficient to sustain the racial classification established by Proposition I. As we have often noted, racial classifications may only be upheld where "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). It goes without saying that a self-serving conclusory statement of necessity will not suffice to fulfill this burden. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 28, 29–31 (1971) (rejecting a similar list of justifications for establishing a racial classification). "In any event, [respondents] have failed to show that the purpose[s] they impute to the [Proposition] could not be accomplished by alternative methods, not involving racial distinctions." *Lee* v. *Nyquist*, 318 F. Supp., at 720.

Parenthetically, it is interesting to note that the allegedly compelling interest in establishing "neighborhood schools" so often referred to by the majority appears nowhere in the official list of justifications. The absence of any mention of this supposed justification is not surprising in light of the fact that the Proposition's ban on student "assignment" effectively prevents desegregation remedies that would not require a student to leave his "neighborhood." See n. 3, *supra*.

The fact that California attempts to cloak its discrimination in the mantle of the Fourteenth Amendment does not alter this result. Although it might seem "paradoxical" to some Members of this Court that a referendum that adopts the wording of the Fourteenth Amendment might violate it, the paradox is specious. Because of the Supremacy Clause, Proposition I would have precisely the same legal effect if it contained no reference to the Fourteenth Amendment. The lesson of *Seattle* is that a State, in prohibiting conduct that is not required by the Fourteenth Amendment, may nonetheless create a discriminatory reallocation of governmental power that does violate equal protection. The fact that some less effective avenues remain open to those interested in mandatory student assignment to eliminate racial isolation, like the fact that the voters in *Hunter* conceivably might have enacted fair housing legislation, or that those interested in busing to eliminate racial isolation in *Seattle* conceivably might use the State's referendum process, does not justify the discriminatory reallocation of governmental decisionmaking.

In this case, the reallocation of power occurs in the judicial process—the major arena minorities have used to ensure the protection of rights "in their interest." *Hunter* v. *Erickson*, *supra*, at 395 (Harlan, J., concurring). Certainly, *Hunter* and *Seattle* cannot be distinguished on the ground that they concerned the reallocation of legislative power, whereas Proposition I redistributes the inherent power of a court to tailor the remedy to the violation. As we have long recognized, courts too often have been "the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP* v. *Button*, 371 U. S. 415, 430 (1963). See *Reitman* v. *Mulkey*, 387 U. S., at 377 (invalidating state constitutional amendment because "[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, *or judicial* regulation at any level of the state government") (emphasis added). It is no wonder, as the present case amply illustrates, that whatever progress has been made towards the elimination of *de facto* segregation has come from the California courts. Indeed, Proposition I, by denying full access to the only branch of government that has been willing to address this issue meaningfully, is far worse for those seeking to vindicate the plainly unpopular cause of racial integration in the public schools than a simple reallocation of an often unavailable and unresponsive legislative process. To paraphrase, "[i]t surely is an excessively formal exercise . . . to argue that the procedural revisions at issue in *Hunter* [and *Seattle*] imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by [Proposition I] does not erect comparable political obstacles." *Seattle*, *ante*, at 475, n. 17.

III

Even if the effects of Proposition I somehow can be distinguished from the enactments at issue in *Hunter* and *Seattle*, the result reached by the majority today is still plainly inconsistent with our precedents. Because it found that the segregation of the California public schools violated the Fourteenth Amendment, the state trial court never considered whether Proposition I was itself unconstitutional because it was the product of discriminatory intent. Despite the absence of *any* factual record on this issue, the Court of Appeal rejected petitioners' argument that the law was motivated by a discriminatory intent on the ground that the recitation of several potentially legitimate purposes in the legislation's preamble rendered any claim that it had been enacted for an invidious purpose "pure speculation." 113 Cal. App. 3d 633, 655, 170 Cal. Rptr. 495, 509 (1981).

In *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 266 (1977), we declared that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Petitioners assert that the disproportionate impact of Proposition I, combined with the circumstances surrounding its adoption and the history of opposition to integration cited *supra*, at 548–551, clearly indicates the presence of discriminatory intent. See Brief for Petitioners 64–96. Yet despite the fact that *no inquiry* has been conducted into these allegations by either the trial or the appellate court, this Court, in its haste to uphold the banner of "neighborhood schools," affirms a factual determination that was never made. Such blind allegiance to the conclusory statements of a lower court is plainly forbidden by our prior decisions.[7]

IV

Proposition I is in some sense "better" than the Washington initiative struck down in *Seattle*.[8] In their generosity, California voters have allowed those seeking racial balance to petition the very school officials who have steadfastly maintained the color line at the schoolhouse door to comply voluntarily with their continuing state constitutional duty to desegregate. At the same time, the voters have deprived minorities of the only method of redress that has proved effective—the full remedial powers of the state judiciary. In the name of the State's "ability to experiment," *ante*, at 535, the Court today allows this placement of yet another burden in the path of those seeking to counter the effects of nearly three centuries of racial prejudice. Because this decision is neither justified by our prior decisions nor consistent with our duty to guarantee all citizens the equal protection of the laws, I must dissent.

---

[7] The majority's reliance on *Reitman* v. *Mulkey*, 387 U. S. 369 (1967), is therefore misplaced. How can any deference be given to the state court's "knowledge of the facts and circumstances concerning the passage and potential impact" of Proposition I, *id.*, at 378, when no such findings were ever made.

[8] Initiative 350, however, at least did "not hinder [the] State from enforcing [the State] Constitution." *Seattle*, *ante*, at 490, n. 3 (POWELL, J., dissenting).

GRIFFIN *v.* OCEANIC CONTRACTORS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81–614. Argued April 26, 1982—Decided June 30, 1982

Title 46 U. S. C. § 596, after obligating the master or owner of a vessel making coasting or foreign voyages to pay a seaman's unpaid wages within specified periods after his discharge, provides that a master or owner who fails to make such payment "without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods." Petitioner, who was injured while working aboard respondent's vessel in foreign waters, brought suit under the Jones Act and general maritime law in Federal District Court after respondent refused to pay his medical expenses and to furnish transportation back to the United States. In addition to damages, petitioner sought to recover penalty wages under § 596 for respondent's failure to pay $412.50 in earned wages allegedly due upon discharge. The court found, *inter alia*, that petitioner had been discharged from respondent's employ on the day of the injury, and that respondent's failure to pay petitioner the $412.50 was "without sufficient cause." In assessing the penalty wages at $6,881.60, the court held that "[t]he period during which the penalty runs is to be determined by the sound discretion of the district court and depends on the equities of the case." It determined that the appropriate penalty period was the 34-day period from the date of discharge through the date when petitioner began work for another company. Petitioner appealed the award of damages as inadequate, but the Court of Appeals affirmed.

Held: The district courts have no discretion to limit the period during which the wage penalty is assessed. Imposition of the penalty is mandatory for each day that payment is withheld in violation of § 596. Pp. 569–577.

(a) The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion either in deciding whether to exact payment or in choosing the period of days by which the payment is to be calculated. After the District Court found that respondent had refused to pay petitioner the balance of his earned wages promptly after discharge and that its refusal was "without sufficient cause," nothing in § 596's language vested the court with discretion to limit the penalty assessment to the period of petitioner's unemployment. Pp. 569–571.

(b) This is not the type of case where literal application of a statute would thwart its obvious purpose. Section 596's "evident purpose" is "to secure prompt payment of seamen's wages . . . and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Collie* v. *Fergusson*, 281 U. S. 52, 55. Although the statute's purpose is remedial, Congress has chosen to secure that purpose through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment. The legislative history confirms that Congress intended the statute to mean exactly what its plain language says. Pp. 571–574.

(c) Nor is literal application of § 596 in this case precluded on the asserted ground that it would produce an absurd and unjust result which Congress could not have intended. Even though the penalty for respondent's failure to promptly pay the $412.50 in wages—if computed on the basis of the period from petitioner's discharge until the date respondent actually paid the wages by satisfying the District Court's judgment—would be over $300,000, awards made under § 596 were not intended to be merely compensatory. Since the District Court found that respondent's refusal to pay petitioner following his discharge was without sufficient cause, and since it made no finding that respondent's continuing delay in payment beyond the period petitioner was unable to work was for sufficient cause, its decision to limit the penalty was error. *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245. Pp. 574–577.

664 F. 2d 36, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 577.

Robert A. Chaffin argued the cause and filed briefs for petitioner.

Theodore Goller argued the cause and filed a brief for respondent.

JUSTICE REHNQUIST delivered the opinion of the Court.

This case concerns the application of 46 U. S. C. § 596, which requires certain masters and vessel owners to pay seamen promptly after their discharge and authorizes seamen to recover double wages for each day that payment is delayed without sufficient cause. The question is whether the district courts, in the exercise of discretion, may limit the period during which this wage penalty is assessed, or whether imposition of the penalty is mandatory for each day that payment is withheld in violation of the statute.

I

On February 18, 1976, petitioner signed an employment contract with respondent in New Orleans, agreeing to work as a senior pipeline welder on board vessels operated by respondent in the North Sea. The contract specified that petitioner's employment would extend "until December 15, 1976 or until Oceanic's 1976 pipeline committal in the North Sea is fulfilled, whichever shall occur first." App. 41. The contract also provided that respondent would pay for transportation to and from the worksite, but that if petitioner quit the job prior to its termination date, or if his services were terminated for cause, he would be charged with the cost of transportation back to the United States. Respondent reserved the right to withhold $137.50 from each of petitioner's first four paychecks "as a cash deposit for the payment of your return transportation in the event you should become obligated for its payment." *Id.*, at 47. On March 6, 1976, petitioner flew from the United States to Antwerp, Belgium, where he reported to work at respondent's vessel, the "Lay Barge 27," berthed in the Antwerp harbor for repairs.

On April 1, 1976, petitioner suffered an injury while working on the deck of the vessel readying it for sea. Two days later he underwent emergency surgery in Antwerp. On April 5, petitioner was discharged from the hospital and went to respondent's Antwerp office, where he spoke with Jesse Williams, the welding superintendent, and provided a physician's statement that he was not fit for duty. Williams refused to acknowledge that petitioner's injury was work-related and denied that respondent was liable for medical and hospital expenses, maintenance, or unearned wages. Williams also refused to furnish transportation back to the United States, and continued to retain $412.50 in earned wages that had been deducted from petitioner's first three paychecks for that purpose. Petitioner returned to his home in Houston, Tex., the next day at his own expense. He was examined there by a physician who determined that he would be able to resume work on May 3, 1976. On May 5, petitioner began working as a welder for another company operating in the North Sea.

In 1978 he brought suit against respondent under the Jones Act, § 20, 38 Stat. 1185, as amended, 46 U. S. C. § 688, and under general maritime law, seeking damages for respondent's failure to pay maintenance, cure, unearned wages, repatriation expenses, and the value of certain personal effects lost on board respondent's vessel. Petitioner also sought penalty wages under Rev. Stat. § 4529, as amended, 46 U. S. C. § 596, for respondent's failure to pay over the $412.50 in earned wages allegedly due upon discharge. The District Court found for petitioner and awarded damages totalling $23,670.40.

Several findings made by that court are particularly relevant to this appeal. First, the court found that petitioner's injury was proximately caused by an unseaworthy condition of respondent's vessel. App. 17, ¶ 10; 23, ¶ 6. Second, the court found that petitioner was discharged from respondent's employ on the day of the injury, and that the termination of his employment was caused solely by that injury. *Id.*, at 18, ¶ 16; 23, ¶ 7.[1] Third, it found that respondent's failure to pay petitioner the $412.50 in earned wages was "without sufficient cause." *Id.*, at 20, ¶20; 25, ¶11.[2] Finally, the court found that petitioner had exercised due diligence in attempting to collect those wages. *Id.*, at 20, ¶21.

---

[1] According to respondent, petitioner was not formally discharged until June 1, 1976, but his termination was made retroactive to April 1. Brief for Respondent 5.

In assessing penalty wages under 46 U. S. C. § 596, the court held that "[t]he period during which the penalty runs is to be determined by the sound discretion of the district court and depends on the equities of the case." App. 25, ¶11. It determined that the appropriate period for imposition of the penalty was from the date of discharge, April 1, 1976, through the date of petitioner's reemployment, May 5, 1976, a period of 34 days. Applying the statute, it computed a penalty of $6,881.60.[3] Petitioner appealed the award of damages as inadequate.

The Court of Appeals for the Fifth Circuit affirmed. 664 F. 2d 36 (1981). That court concluded, *inter alia*, that the District Court had not erred in limiting assessment of the penalty provided by 46 U. S. C. § 596 to the period beginning April 1 and ending May 5. The court recognized that the statute required payment of a penalty for each day during which wages were withheld until the date they were actually paid, which in this case did not occur until September 17, 1980, when respondent satisfied the judgment of the District Court. *Id.*, at 40; see App. 30. Nevertheless, the court believed itself bound by prior decisions within the Circuit, which left calculation of the penalty period to the sound discretion of the district courts. 664 F. 2d, at 40. It concluded that the District Court in this case had not abused its discretion by assessing a penalty only for the period during which petitioner was unemployed.

---

[2] The court also found:

"Defendant did not begin a thorough investigation of plaintiff's claim until September 30, 1976. The investigation was not made with reasonable diligence. Defendant's failure to pay maintenance and cure, repatriation expenses, the cost of his personal effects, and earned and unearned wages to plaintiff constituted arbitrary, unreasonable, callous, and willful disregard of plaintiff's rights." App. 20, ¶21.

[3] The court found that the daily wage rate to be used in calculating the penalty was $101.20. In accordance with the statute, the court assessed a penalty of twice this rate ($202.40) for each of the 34 days of the penalty period.

We granted certiorari to resolve a conflict among the Circuits regarding the proper application of the wage penalty statute.[4] 454 U. S. 1052 (1981). We reverse the judgment of the Court of Appeals as to that issue.[5]

II

A

The language of the statute first obligates the master or owner of any vessel making coasting or foreign voyages to pay every seaman the balance of his unpaid wages within specified periods after his discharge.[6] It then provides:

---

[4] The Courts of Appeals for the Third and Ninth Circuits have interpreted the statute to mandate imposition of the penalty for each day until the wages are paid and to leave no room for the district court's exercise of discretion. *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d 81 (CA3 1966); *Larkins* v. *Hudson Waterways Corp.*, 640 F. 2d 997 (CA9 1981); *Thomas* v. *SS Santa Mercedes*, 572 F. 2d 1331 (CA9 1978). The Courts of Appeals for the First, Second, and Fourth Circuits have adopted the interpretation followed by the Fifth Circuit. *Mavromatis* v. *United Greek Shipowners Corp.*, 179 F. 2d 310 (CA1 1950); *Forster* v. *Oro Navigation Co.*, 228 F. 2d 319 (CA2 1955), aff'g 128 F. Supp. 113 (SDNY 1954); *Southern Cross S.S. Co.* v. *Firipis*, 285 F. 2d 651 (CA4 1960), cert. denied, 365 U. S. 869 (1961). We noted this conflict in *American Foreign S.S. Co.* v. *Matise*, 423 U. S. 150, 152, n. 1 (1975).

[5] Petitioner has not questioned the other holdings of the Court of Appeals in his case. Respondent did not appeal from the judgment of the District Court and has not cross-petitioned for certiorari here.

[6] The statute reads in full:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time

> "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods . . . ."

The statute in straightforward terms provides for the payment of double wages, depending upon the satisfaction of two conditions. First, the master or owner must have refused or failed to pay the seaman his wages within the periods specified. Second, this failure or refusal must be "without sufficient cause." Once these conditions are satisfied, however, the unadorned language of the statute dictates that the master or owner "*shall pay* to the seaman" the sums specified "*for each and every day* during which payment is delayed." The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion either in deciding whether to exact payment or in choosing the period of days by which the payment is to be calculated. As this Court described the statute many years ago, it "affords a definite and reasonable procedure by which the seaman may establish his right to recover double pay where his wages are unreasonably withheld." *McCrea* v. *United States*, 294 U. S. 23, 32 (1935). Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, "that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980).

---

of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

The District Court found that respondent had refused to pay petitioner the balance of his earned wages promptly after discharge, and that its refusal was "without sufficient cause." Respondent challenges neither of these findings. Although the two statutory conditions were satisfied, however, the District Court obviously did not assess double wages "for each and every day" during which payment was delayed, but instead limited the assessment to the period of petitioner's unemployment. Nothing in the language of the statute vests the courts with the discretion to set such a limitation.

B

Nevertheless, respondent urges that the legislative purpose of the statute is best served by construing it to permit some choice in determining the length of the penalty period. In respondent's view, the purpose of the statute is essentially remedial and compensatory, and thus it should not be interpreted literally to produce a monetary award that is so far in excess of any equitable remedy as to be punitive.

Respondent, however, is unable to support this view of legislative purpose by reference to the terms of the statute. "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543 (1940). See *Caminetti* v. *United States*, 242 U. S. 470, 490 (1917). Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling. We have reserved "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute.'" *Commissioner* v. *Brown*, 380 U. S. 563, 571 (1965) (quoting *Helvering* v. *Hammel*, 311 U. S. 504, 510–511 (1941)). This, however, is not the exceptional case.

As the Court recognized in *Collie* v. *Fergusson*, 281 U. S. 52 (1930), the "evident purpose" of the statute is "to secure prompt payment of seamen's wages . . . and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Id.*, at 55. This was to be accomplished "by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible." *Id.*, at 55–56. Thus, although the sure purpose of the statute is remedial, Congress has chosen to secure that purpose through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment.

The legislative history of the statute leaves little if any doubt that this understanding is correct. The law owes its origins to the Act of July 20, 1790, ch. 29, §6, 1 Stat. 133, passed by the First Congress. Although the statute as originally enacted gave every seaman the right to collect the wages due under his contract "as soon as the voyage is ended," it did not provide for the recovery of additional sums to encourage compliance. Such a provision was added by the Shipping Commissioners Act of 1872, ch. 322, §35, 17 Stat. 269, which provided for the payment of "a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed." The Act of 1872 obviously established a ceiling of 10 days on the period during which the penalty could be assessed and, by use of the words "not exceeding," left the courts with discretion to choose an appropriate penalty within that period.[7]

---

[7] The Act of 1790 and the Act of 1872 provided the basis for § 4529 of the Revised Statutes, codified in 1878. Section 4529 read as follows:

"The master or owner of every vessel making voyages from a port on the Atlantic to a port on the Pacific, or vice versa, shall pay to every seaman his wages, within two days after the termination of the agreement, or at the time such seaman is discharged, whichever first happens; and, in the

Congress amended the law again in 1898. As amended, it read in relevant part:

> "Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods." Act of Dec. 21, 1898, ch. 28, §4, 30 Stat. 756.

The amending legislation thus effected two changes: first, it removed the discretion theretofore existing by which courts might award less than an amount calculated on the basis of each day during which payment was delayed, and, second, it removed the 10-day ceiling which theretofore limited the number of days upon which an award might be calculated. The accompanying Committee Reports identify the purpose of the legislation as "the amelioration of the condition of the American seamen," and characterize the amended wage penalty in particular as "designed to secure the promptest possible payment of wages." H. R. Rep. No. 1657, 55th Cong., 2d Sess., 2, 3 (1898). See also S. Rep. No. 832, 54th Cong., 1st Sess., 2 (1896).[8] Nothing in the legislative history of the

---

case of vessels making foreign voyages, within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account, a sum equal to one-fourth part of the balance due him. Every master or owner who neglects or refuses to make payment in manner hereinbefore mentioned, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods; which sum shall be recoverable as wages in any claim made before the court. But this section shall not apply to the masters or owners of any vessel the seamen on which are entitled to share in the profits of the cruise or voyage."

[8] The 1898 Act was substantially identical to legislation that had passed the House in the previous Congress, and had been favorably reported in the Senate, but had failed to come to a vote before the end of the session. Thus, the House Report of the legislation enacted in 1898 contained little

1898 Act suggests that Congress intended to do anything other than what the Act's enacted language plainly demonstrates: to strengthen the deterrent effect of the statute by removing the courts' latitude in assessing the wage penalty.

The statute was amended for the last time in 1915 to increase further the severity of the penalty by doubling the wages due for each day during which payment of earned wages was delayed. Seamen's Act of 1915, ch. 153, § 3, 38 Stat. 1164. There is no suggestion in the Committee Reports or in the floor debates that, in so doing, Congress intended to reinvest the courts with the discretion it had removed in the Act of 1898. Resort to the legislative history, therefore, merely confirms that Congress intended the statute to mean exactly what its plain language says.

III

Respondent argues, however, that a literal construction of the statute in this case would produce an absurd and unjust result which Congress could not have intended. The District Court found that the daily wage to be used in computing the penalty was $101.20. If the statute is applied literally, petitioner would receive twice this amount for each day after his discharge until September 17, 1980, when respondent satisfied the District Court's judgment.[9] Petitioner would re-

---

more than a reproduction of the House Report of the previous Congress, and the relevant Senate Report also dates from that Congress.

[9] Respondent assumes that the penalty would run until September 17, 1980, since that was the date on which it finally paid petitioner the $412.50. Brief for Respondent 17. Petitioner, on the other hand, apparently assumes that the penalty period expired on May 6, 1980, the date of the District Court's judgment. Brief for Petitioner 19. Under our construction of the statute, the District Court's entry of judgment will not toll the running of the penalty period unless delays beyond that date are explained by sufficient cause. See *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245, 250–251 (1916) (holding that when an appeal is taken on reasonable grounds, the penalty should not apply to delays in payment beyond the date on which the district court's decree is entered, since those delays are supported by sufficient cause). The Court of Appeals for the Fourth Cir-

ceive over $300,000 simply because respondent improperly withheld $412.50 in wages. In respondent's view, Congress could not have intended seamen to receive windfalls of this nature without regard to the equities of the case.

It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. See *United States* v. *American Trucking Assns., Inc.*, 310 U. S., at 542–543; *Haggar Co.* v. *Helvering*, 308 U. S. 389, 394 (1940). In refusing to nullify statutes, however hard or unexpected the particular effect, this Court has said:

> "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts." *Crooks* v. *Harrelson*, 282 U. S. 55, 60 (1930).

It is highly probable that respondent is correct in its contention that a recovery in excess of $300,000 in this case greatly exceeds any actual injury suffered by petitioner as a result of respondent's delay in paying his wages. But this Court has previously recognized that awards made under this statute were not intended to be merely compensatory:

> "We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible." *Collie* v. *Fergusson*, 281 U. S., at 55–56.

---

cuit, in *Southern Cross S.S. Co.* v. *Firipis*, 285 F. 2d, at 660, and the Court of Appeals for the Third Circuit in *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d, at 88, n. 26, have interpreted this Court's decision in *Pacific Mail* to permit the employer to toll the running of the penalty period by placing in the hands of the court the allegedly unlawfully withheld wages.

It is in the nature of punitive remedies to authorize awards that may be out of proportion to actual injury; such remedies typically are established to deter particular conduct, and the legislature not infrequently finds that harsh consequences must be visited upon those whose conduct it would deter. It is probably true that Congress did not precisely envision the grossness of the difference in this case between the actual wages withheld and the amount of the award required by the statute. But it might equally well be said that Congress did not precisely envision the trebled amount of some damages awards in private antitrust actions, see *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 344–345 (1979), or that, because it enacted the Endangered Species Act, "the survival of a relatively small number of three-inch fish . . . would require the permanent halting of a virtually completed dam for which Congress ha[d] expended more than $1 million," *TVA* v. *Hill*, 437 U. S. 153, 172 (1978). It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not. See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S., at 123–124; *Reiter* v. *Sonotone*, *supra*, at 344–345.

Finally, we note that our holding is consistent with *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245 (1916). The employer in that case challenged a decision by the Court of Appeals to apply the wage penalty to the delay after the District Court's judgment occasioned by the employer's appeal. The Court held that on the facts of that case, application of the penalty beyond the date of the District Court's judgment was error. Contrary to respondent's assertion, however, the holding does not reflect the discretionary tailoring of the penalty to the equities of the case. Instead, the Court held that the delay pending appeal was not "without sufficient cause," as required by the statute before the penalty can attach.

Id., at 250.[10] As we explained earlier, a condition to the imposition of the wage penalty is a finding that the delay in payment is "without sufficient cause." To the extent that the equities of the situation are to be considered, see *Collie* v. *Fergusson*, *supra*, they bear on that finding, and not on the calculation of the penalty period once that finding has been made.

IV

The District Court found that respondent's refusal to pay petitioner earned wages following his discharge was without sufficient cause. It applied the wage penalty only for the period of nonpayment during which petitioner was unable to work. It made no finding, however, that respondent's continuing delay in payment beyond that period was for sufficient cause. Under the plain language of the statute, therefore, its decision to limit the penalty period was error. The judgment of the Court of Appeals affirming that decision accordingly is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand. The language of the statute is usually sufficient to answer that question, but "the reports are full of cases" in which the will of the legislature is not reflected in a literal reading of the words it has chosen.[1] In my opinion this is such a case.

---

[10] The Court found that the employer "had strong and reasonable ground for believing that the statute ought not to be held to apply," 241 U. S., at 250, because the work for which the seaman claimed unpaid wages did not occur during a voyage and was the result of an oral contract.

[1] "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the

Qualifying language in 46 U. S. C. § 596 supports a much narrower construction than the Court adopts. For over 50 years after the statute's most recent amendment in 1915, federal judges consistently construed it to avoid the absurd result the Court sanctions today. Their reading of the statute was consistent with the specific purposes achieved by the amendments in 1898 and 1915, as well as with the meaning of the statute when an award for unearned wages was first authorized.

I

On April 1, 1976, petitioner, a welder, suffered a temporarily disabling injury aboard respondent's vessel. On April 5, 1976, petitioner met with respondent's welding superintendent, who refused to acknowledge that respondent was responsible for the injury and who also refused to pay petitioner $412.50 in earned wages. Petitioner fully recovered from the injury by May 3, 1976, and two days later obtained comparable work with another employer. He filed this action on February 3, 1978. It is now settled that respondent was responsible for petitioner's injury and that respondent wrongfully refused to pay him $412.50 on April 5, 1976.

The question of statutory construction that is before us is what "sum shall be recoverable as wages" to compensate petitioner for respondent's refusal to pay him $412.50 on April 5, 1976. 46 U. S. C. § 596.[2] The District Court computed that sum by doubling his daily wage of $101.20 and multi-

---

intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459 (1892).

[2] The statute is quoted in full, *ante*, at 569–570, n. 6.

plying that amount by 34—the number of days between the injury on April 1 and petitioner's reemployment on May 5, 1976. The District Court's award thus amounted to $6,881.60.[3] This Court holds that the sum recoverable as wages amounts to at least $302,790.40.[4]

II

In pertinent part, § 596 provides as follows:

> "Every master or owner who refuses or neglects to make payment [of a seaman's earned wages within four days after the seaman's discharge] without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the [4-day period], *which sum shall be recoverable as wages* in any claim made before the court . . . ."[5] (Emphasis added.)

The text of the statute admittedly supports the construction given it by the Court—if there was not sufficient cause for the refusal to make payment within four days of the discharge, then the seaman is entitled to double wages for the entire period between the fourth day and the date the payment is finally made. The statute, however, is susceptible of another interpretation. Indeed, for a half century following its latest amendment the federal courts, including this Court, consistently exercised some discretion in determining the sum recoverable as wages under this section.

---

[3] The Court of Appeals held that the award did not constitute an abuse of discretion. 664 F. 2d 36, 40 (CA5 1981).

[4] This figure is computed by reference to the period between April 1, 1976 (date of discharge), and May 6, 1980 (date of judgment). But see *ante*, at 574–575, n. 9.

[5] The Court omits the italicized clause of the statute when it quotes the statute in the text of its opinion. *Ante*, at 570 and 573. Because wage claims, unlike penalties, have consistently been accorded a high priority in insolvency proceedings against employers, it seems to me the clause is pertinent to our task of discerning the intent of Congress in authorizing an award of double wages. See also *infra*, at 582–583.

A

In fixing the amount of the award of double wages, the District Court in this case may have reasoned that respondent had sufficient cause for its delay in paying the earned wages after petitioner obtained employment with another shipmaster, but that there was not sufficient cause for its failure to make payment before that time. Although this reasoning conflicts with a literal reading of § 596, it is perfectly consistent with this Court's contemporary construction of the statute in *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245 (1916). The teaching of Justice Holmes' opinion for the Court in that case is that the wrongful character of the initial refusal to pay does not mean that all subsequent delay in payment is also "without sufficient cause" within the meaning of the statute.

The controversy in *Pacific Mail* arose in 1913, when the statute provided that the sum recoverable as wages was measured by one day's pay, rather than double that amount, for each day that the wages were withheld without sufficient cause; the statute was otherwise exactly as it is today. The seaman was discharged on October 1, 1913, but $30.33 was withheld from his wages because he was believed responsible for the loss of some silverware. He filed an action on October 20, 1913, and on November 5, 1913, obtained a judgment for his wages and an additional sum of $151.59, representing the sum recoverable as wages for the period between October 1 and November 5, 1913. The District Court's decree established the proposition that the vessel owner's defenses did not constitute sufficient cause for refusing to pay the wages and requiring the seaman to sue to recover them.

The vessel owner prosecuted an unsuccessful appeal. The Court of Appeals not only affirmed the decision of the District Court, but also added an additional recovery of daily wages for the period between the entry of the original judgment on November 5 and the actual payment of the disputed wages. The Court of Appeals thus read the statute literally and ordered the result that the District Court's finding seemed to dictate. This Court, however, set aside the additional recovery, reaching a conclusion that cannot be reconciled with a wooden, literal reading of the statute. Concurrent findings of the District Court and the Court of Appeals established that the refusal to make the wage payment when due was without sufficient cause. Justice Holmes and his Brethren accepted that finding for purposes of decision, but reasoned that there was sufficient cause for the owner's decision to appeal and his refusal to pay while the appeal was pending.

The curious character of this Court's conclusion that reasons insufficient to justify the refusal to pay before the trial court's decision somehow became sufficient to justify a subsequent refusal to pay is not the most significant point to Justice Holmes' opinion. The case is primarily significant because its holding cannot be squared with a literal reading of the statute.[6] Even though the initial refusal is without sufficient cause, statutory wages are not necessarily recoverable for the entire period until payment is made either to the seaman or to a stakeholder.[7] A subsequent event—even though not expressly mentioned in the statute itself—may foreshorten the recovery period.

---

[6] In a petition for rehearing, after pointing out that the Court had adopted an interpretation of the statute that had not been urged in any of the briefs or in any of the opinions of the lower courts, the seaman argued:

"According to the grammatical, natural and unambiguous meaning conveyed by the words of section 4529, R. S., Congress has limited the running of penalties only by a 'sufficient cause' for original non-payment of earned wages—a sufficient cause operating to prevent penalties from ever beginning to accrue; once these penalties begin to run, nothing short of actual payment or tender can suffice to prevent the continuous accrual of the per diem penalties." Pet. for Rehearing, O. T. 1915, No. 323, p. 5.

[7] Petitioner argues that literal application of § 596 will not yield harsh results because the shipmaster may toll the period of delay by tendering the disputed wage claim into the registry of the court. Brief for Petitioner 27. In petitioner's words, the master may make a "constructive payment

In *Pacific Mail* the subsequent event was the vessel owner's decision to appeal. The finding that that event provided sufficient cause for the delay after November 5, 1913, was made *sua sponte* by this Court. In this case the subsequent event was the reemployment of petitioner in a comparable job on May 5, 1976. The finding that that event—coupled with the failure to make any additional demand for almost two years thereafter—was sufficient cause for the delay after May 5, 1976, was made by the District Court. It is true that the judge did not expressly frame his decision in these terms, but his actual decision fits precisely the mold established by *Pacific Mail*. Both cases give a flexible reading to the "sufficient cause" language in the statute. They differ with respect to the nature of the subsequent event but not with respect to their departure from the statutory text.[8]

B

The second case in which this Court construed § 596, *Collie* v. *Fergusson*, 281 U. S. 52 (1930), also focused on the meaning of the phrase "without sufficient cause." In that case the unpaid seamen claimed that the financial necessities of the owner could not constitute sufficient cause for delay in wage payments; that contention was surely consistent with the plain language of the statute. This Court nevertheless denied recovery, construing the statute as implicitly containing a requirement that the refusal be "in some sense arbitrary or

---

of wages." *Id.*, at 28. The Court seems to accept this argument. See *ante*, at 574–575, n. 9. Neither petitioner nor the Court seems to recognize that acceptance of this minimal tolling rule conflicts with a literal reading of the statute. A tender of wages to the court is a "constructive payment of wages" only because a court has added that reasonable gloss to the statute.

[8] If the Court today were to read *Pacific Mail* as requiring that the subsequent-event finding be made expressly, I would either follow Justice Holmes' lead by making a comparable finding in this Court or I would remand to the District Court for additional findings on this issue.

wilful, or at least a failure not attributable to impossibility of payment." *Id.*, at 55. The Court adopted this nonliteral construction of the statute because it recognized the significance of the provision that a seaman's double-wage claim "shall be recoverable as wages in any claim made before the Court." See *id.*, at 54. In any proceeding arising out of the insolvency of the vessel owner, this provision accords this type of claim priority over general creditors and various lienors who have stronger equitable claims on limited assets. The construction of the words "without sufficient cause" to narrow the protection of the statute was consistent with the intent of Congress even though it involved a rather flexible reading of the text of the statute itself.[9]

This Court's third occasion to interpret § 596 was *McCrea* v. *United States*, 294 U. S. 23 (1935), and, once again, the Court construed the statute narrowly, this time by taking a literal approach. In that case the seaman, citing specific sections of federal legislation, demanded from the shipmaster his discharge, his earned wages, and other benefits. The master was unfamiliar with the cited sections and asked the seaman to meet with him at noon the next day for an informed discussion of the demands. The seaman missed the appointment and left the country without contacting the master. After his return to the United States, the seaman filed an action in which he claimed entitlement to, *inter alia*, his earned wages and double wages for the delay in payment. The District Court, affirmed by the Court of Appeals, held that the owner of the ship, the United States, was immune from the double-wage provision of § 596 because the double wages constituted a penalty. This Court granted the seaman's petition for certiorari, but avoided decision of the sovereign immunity question by holding that there was sufficient cause for the failure of the shipmaster to make the wage payment within four days of the seaman's discharge. The Court then rejected the seaman's rather reasonable argument that even if the shipmaster had cause to withhold payment during those four days, there was not sufficient cause for the continued refusal once the seaman filed his action and formally made his claim to earned wages. The Court, without citing *Pacific Mail*, held that if the master's failure to pay earned wages at the time specified in the statute was justified by sufficient cause, the fact that he later refused to pay pursuant to a proper demand could not give rise to statutory liability even though there was no sufficient cause for the subsequent refusal.

---

[9] The District Court's finding of arbitrariness in this case—which, in view of the holding in *Collie*, was necessary if any penalty wage were to be recovered—must be read in the context of its actual award. It was not clearly erroneous to find that the refusal to pay petitioner $412.50 was arbitrary while he was unemployed; it surely was not equally arbitrary during the ensuing 2-year period when he was employed by a competitor and did not renew his demand.

These early interpretations of § 596 dispel any notion that the statute means exactly what it says. The Court has construed the statute "to effect its purpose," *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952), and, as the early cases demonstrate, the purpose of the statute does not always require the award of double wages in the amount that the statute literally specifies.

C

Flexibility also has characterized the applications of the statute rendered by the lower federal courts. For decades those courts consistently concluded that Congress intended to allow judicial discretion to play a part in determining the amount of the double-wage recovery.[10] Whether those decisions were entirely consistent with the meaning a grammarian might have placed on the statute is less significant than the fact that they were entirely consistent with this Court's

---

[10] See *Mystic S.S. Co.* v. *Stromland*, 20 F. 2d 342, 344 (CA4) ("The District Court, by limiting the right of recovery to 10 days after the libel was filed, in effect placed a limitation on the amount of the recovery under the statute. Was there objection to this? We think not"), rehearing denied, 21 F. 2d 607 (1927), cert. denied, 276 U. S. 618 (1928); *Mavromatis* v. *United Greek Shipowners Corp.*, 179 F. 2d 310, 316 (CA1 1950) ("The language of § 596 has been given a somewhat free reading so as to accord to

---

the courts a considerable margin of discretion in adjusting the duration of the penalty to the equities of the particular case"); *Prindes* v. *S.S. African Pilgrim*, 266 F. 2d 125, 128 (CA4 1959) ("The period during which the penalty accumulates is to be determined by the equities of the particular case"); *Southern Cross S.S. Co.* v. *Firipis*, 285 F. 2d 651, 658 (CA4 1960) ("With regard to liability for double pay, a doctrine had developed before the McCrea case, and has continued to the present time, that the District Court has a measure of discretion through the application of equitable principles in determining the number of days for which double wages should be assessed"), cert. denied, 365 U. S. 869 (1961); *Caribbean Federation Lines* v. *Dahl*, 315 F. 2d 370, 374 (CA5) ("The time for which the penalty provision runs rests within the sound discretion of the court and depends upon the equities of the case"), cert. denied, 375 U. S. 831 (1963); *McConville* v. *Florida Towing Corp.*, 321 F. 2d 162, 168, n. 11 (CA5 1963) ("The Court has wide equitable discretion in fixing the time for which the penalty provision runs"); *The Chester*, 25 F. 2d 908, 911 (Md. 1928) ("[I]n spite of the seeming rigidity of the statute, there is still left to the courts certain discretionary power to limit the penalties"); *The Victoria*, 76 F. Supp. 54, 56 (SDNY 1947) ("In spite of the seeming rigidity of the statute, the court still has discretionary power to limit the penalties"), rev'd on other grounds, 172 F. 2d 434 (CA2 1949); *Forster* v. *Oro Navigation Co.*, 128 F. Supp. 113, 116 (SDNY 1954) ("The number of days for which the defendant must pay double wages rests in the discretion of the court and depends on the equities of the particular case"), aff'd, 228 F. 2d 319 (CA2 1955); *Samad* v. *The Etivebank*, 134 F. Supp. 530, 542 (ED Va. 1955) ("The number of days for which respondents must pay double wages rests in the discretion of the Court and depends upon the equities of the particular case"); *Spero* v. *Steamship The Argodon*, 150 F. Supp. 1, 6 (ED Va. 1957) ("It is well settled that the number of days for which respondents must pay double wages rests in the discretion of the Court and depends upon the equities of the particular case"); *Kontos* v. *SS Sophie C.*, 236 F. Supp. 664, 674 (ED Pa. 1964) ("Although the penalty is applicable, its duration seems to be committed to the discretion of the trial judge to tailor to the equities of the particular case"); *Ventiadis* v. *C. J. Thibodeaux & Co.*, 295 F. Supp. 135, 138 (SD Tex. 1968) ("'The time for which the penalty provision runs rests within the sound discretion of the court and depends upon the equities of the case'"); see also *Swanson* v. *Torry*, 25 F. 2d 835 (CA4 1928); *The Lake Galewood*, 21 F. 2d 987 (Md. 1927), aff'd, 25 F. 2d 1020 (CA4), cert. denied, 278 U. S. 637 (1928).

decisions and with one another,[11] and the fact that their holdings must have come to the attention of Congress.

It was not until 1966 that a contrary reading of the statute was adopted by the Third Circuit in *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d 81,[12] and another eight years before that case was followed in another Circuit.[13] I cannot deny that there is wisdom in the rule of construction that mandates close adherence to literal statutory text,[14] but it is also true that a consistent course of judicial construction can become as much a part of a statute as words inserted by the legislature itself. The construction consistently followed by the federal judiciary between 1898 and 1966 was presumably acceptable to Congress, and I find this more persuasive than the literal reading on which the Court places its entire reliance.[15] Moreover, since the result that construction produces in this case is both absurd and palpably unjust, this is one of the cases in which the exercise of judgment dictates a departure from the literal text in order to be faithful to the legislative will.[16]

---

[11] See *Southern Cross S.S. Co.* v. *Firipis*, *supra*, at 655–658.

[12] See 360 F. 2d, at 85 ("Despite this rather precise statutory directive, of those cases which we have uncovered, where the question—whether Section 596 of the statute may still be read with a measure of judicial discretion when supposed equitable considerations present themselves—was considered, all have found proper the balancing of the statutory language with a judicial sense of the equities of each case").

[13] See *Escobar* v. *SS Washington Trader*, 503 F. 2d 271, 274 (CA9 1974), vacated and remanded on other grounds *sub nom. American Trading Transportation Co.* v. *Escobar*, 423 U. S. 1070 (1976).

[14] See, most recently, *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 322–335 (1982) (STEVENS, J., dissenting).

[15] This Court based its interpretation of "sufficient cause" in *Collie* v. *Fergusson*, 281 U. S. 52 (1930), in part upon "the conclusion reached with practical unanimity by the lower federal courts." *Id.*, at 56.

[16] "The Court has had several occasions within the last few years to construe statutes in which conflicts between reasonable intention and literal meaning occurred. We have refused to nullify statutes, however hard or

III

The construction permitting the district court to exercise some discretion in tailoring the double-wage award to the particular equities of the case is just as consistent with the legislative history of § 596 as the Court's new literal approach to this statute. In 1872, when Congress authorized the recovery of additional wages by seamen who were not paid within five days of their discharge, it used the word "shall" to make it clear that such a recovery must be awarded, but it allowed the district courts a limited discretion in setting the amount of such recovery.[17] The judge's discretion as to amount was limited in two ways: (1) the statutory wage rate could not be more than double the amount of the seaman's daily wage; and (2) the period for which the statutory wage could be awarded could not exceed 10 days.

Subsequent amendments to the statute did not remove the requirement that some recovery "shall" be awarded, but did modify both of the limits on the judge's discretion. With respect to the wage rate, Congress first specified that it should

---

unexpected the particular effect, where unambiguous language called for a logical and sensible result. Any other course would be properly condemned as judicial legislation. However, to construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law." *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 332–333 (1938) (footnotes omitted).

[17] The 1872 version of § 596 provided in pertinent part:

"[E]very master or owner who neglects or refuses to make payment [of a seaman's earned wages within five days after the seaman's discharge] without sufficient cause shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the [five-day period]; and such sum shall be recoverable as wages in any claim made before the court . . . ." Act of June 7, 1872, ch. 322, § 35, 17 Stat. 269.

equal the daily rate—rather than double the daily rate—and later specified that the rate should be the double rate.[18] With respect to the period for which the statutory wage was payable, the 1898 amendment simply removed the 10-day limit. This amendment is subject to two different interpretations, one that would represent a rather unremarkable change and the other that would be both drastic and dramatic.

The unremarkable change would amount to nothing more than a removal of the narrow 10-day limit on the scope of the judge's discretion. The word "shall" would continue to do nothing more than require some recovery in an amount to be fixed by the judge, but in recognition of the reality that seamen might be stranded for more than 10 days, the recovery period could extend beyond 10 days. This sort of unremarkable change is consistent with the purpose of the statute,[19] as well as with a legislative history that fails to make any comment on its significance. As JUSTICE REHNQUIST has perceptively observed in another context, the fact that the dog did not bark can itself be significant.[20]

---

[18] The 1898 version of § 596 provided in pertinent part:

"Every master or owner who refuses or neglects to make payment [of a seaman's earned wages within four days of the seaman's discharge] without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the [four-day period], which sum shall be recoverable as wages in any claim made before the court . . . ." Act of Dec. 21, 1898, § 4, 30 Stat. 756.

The 1915 amendment substituted "two days' pay" for "one day's pay." See Act of Mar. 4, 1915, § 3, 38 Stat. 1164–1165.

[19] Justice Cardozo, while a member of the New York Court of Appeals, explained the purpose of the statute:

"The purpose, or at least the predominant one, was, not punishment of the master or owner, but compensation to the seaman. Delay means loss of opportunity to ship upon another vessel. It means hardship during the term of waiting, the sufferer often improvident, and stranded far from home. 'In all fairness he should recover more than the amount due him for wages earned' (*Calvin* v. *Huntley*, 178 Mass. 29, 32)." *Cox* v. *Lykes Brothers*, 237 N. Y. 376, 379, 143 N. E. 226, 227 (1924).

The District Court's award in this case, tolling the period for computing the double wages on the date petitioner obtained employment with another seagoing vessel, was also perfectly consistent with the statutory purpose.

The Court's construction of the amendment is, however, both drastic and dramatic. Instead of effecting a modest enlargement of the judge's discretion to do justice in these cases, the Court's construction effects a complete prohibition of judicial discretion. Instead of permitting recoveries for a period somewhat longer than 10 days, the amendment is construed as a command that even when the unresolved dispute persists for two or three years without any special hardship to the seaman, an automatic recovery must be ordered for the entire period regardless of the equitable considerations that may arise after the shipmaster's initial mistake has been made. Such a major change in both the potential amount of the statutory recovery and the character of the judge's authority would normally be explained in the committee reports or the debates if it had been intended.[21]

---

[20] *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 602 (1980) (dissenting opinion); cf. A. Conan Doyle, Silver Blaze, in The Complete Sherlock Holmes 383 (1938).

[21] The House Report's description of the 1898 amendment was that it "increases from one-fourth to one-third the amount of balance of wages due the seaman, to which he is entitled immediately upon discharge, and, in general, provides for prompter payment of wages of seamen." H. R. Rep. No. 1657, 55th Cong., 2d Sess., 3 (1898). It is noteworthy that the first change described, respecting the part of the seaman's wages to which he is entitled at the time of his discharge in every case, is rather trivial. See the full text of the statute, *ante*, at 569–570, n. 6. And the description of the provision for prompter payment of wages most likely refers to the amendment of the time period during which the shipmaster had to pay the seaman his full wages in order to avoid the double-wage provision of § 596. In the cases of seamen of vessels making foreign voyages, the time period was changed from five days in 1872, see n. 17, *supra*, to four days in 1898, see n. 18, *supra*.

IV

It is ironic that the same seven Justices—who today are transfixed by a literal reading of § 596—only a few days ago blithely ignored the text of the Tax Injunction Act in order to reach the conclusion that a federal court has no jurisdiction to entertain a suit for a declaratory judgment against the United States Secretary of Labor to determine whether a federal statute violates the Federal Constitution. *California* v. *Grace Brethren Church,* 457 U. S. 393 (1982). The inconsistency in the Court's approach to the task of statutory construction in these two cases is less troublesome, however, than its failure in each case to consider whether its conclusion could reasonably be thought to represent the will of Congress. I am not persuaded that the 1898 amendment, removing the 10-day limit on the scope of the trial judge's discretion, was intended to be read as a command to award $302,790.40 to a seaman who was not paid $412.50 in wages when due.

I respectfully dissent.

VELDE, ADMINISTRATOR, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, ET AL. *v.* NATIONAL BLACK POLICE ASSN., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1074. Argued December 9, 1981—Decided June 30, 1982

203 U. S. App. D. C. 202, 631 F. 2d 784, vacated and remanded.

Deputy Solicitor General Geller argued the cause for petitioners. With him on the briefs were *Solicitor General Lee*, *Acting Solicitor General Wallace*, *Acting Assistant Attorney General Schiffer*, *Peter Buscemi*, *Robert E. Kopp*, and *Barbara L. Herwig*.

E. Richard Larson argued the cause for respondents. With him on the brief were *Isabelle Katz Pinzler*, *Bruce J. Ennis*, *William L. Robinson*, and *Norman J. Chachkin*.

PER CURIAM.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982).

JUSTICE POWELL and JUSTICE STEVENS took no part in the consideration or decision of this case.

ALFRED L. SNAPP & SON, INC., ET AL. *v.* PUERTO RICO EX REL. BAREZ, SECRETARY OF LABOR AND HUMAN RESOURCES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1305. Argued April 20, 1982—Decided July 1, 1982

Respondent Commonwealth of Puerto Rico filed suit in Federal District Court against petitioners, individuals and companies engaged in the apple industry in Virginia, alleging that petitioners had violated related provisions of the Wagner-Peyser Act and the Immigration and Nationality Act of 1952, and implementing regulations. The purposes of this statutory and regulatory scheme are to give United States workers, including citizens of Puerto Rico, a preference over temporary foreign workers for jobs that become available within this country, to ensure that working conditions of domestic employees are not adversely affected when foreign workers are brought in, and to prohibit discrimination against United States workers in favor of foreign workers. It was alleged that pursuant to the federal laws petitioners had reported 787 job openings for temporary farm labor to pick the 1978 apple crop, and that in violation of such laws petitioners had discriminated against Puerto Rican workers by failing to provide employment for qualified Puerto Rican migrant farmworkers, by subjecting those Puerto Rican workers that were employed to working conditions more burdensome than those established for temporary foreign workers, and by improperly terminating employment of Puerto Rican workers. Seeking declaratory and injunctive relief in its capacity as *parens patriae*, Puerto Rico asserted that this alleged discrimination deprived the Commonwealth of its right "to effectively participate in the benefits of the Federal Employment Service System of which it is a part" and thereby caused irreparable injury to the Commonwealth's efforts "to promote opportunities for profitable employment for Puerto Rican laborers and to reduce unemployment in the Commonwealth." The District Court dismissed the complaint, holding that Puerto Rico lacked standing to bring the action in view of the small number of individuals directly involved and the slight impact upon Puerto Rico's general economy that the loss of 787 temporary jobs could have. The Court of Appeals reversed.

Held: Puerto Rico has *parens patriae* standing to maintain this suit. Pp. 600-610.

(a) In order to maintain a *parens patriae* action, a State must articulate an interest apart from the interests of particular private parties, that is, the State must be more than a nominal party. The State must express a "quasi-sovereign" interest, such as its interest in the health and well-being—both physical and economic—of its residents in general. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population. A State also has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system—that is, in ensuring that the State and its general population are not excluded from the benefits that are to flow from participation in the federal system. Pp. 600–608.

(b) Under the above principles, Puerto Rico's allegations that petitioners discriminated against Puerto Ricans in favor of foreign laborers falls within the Commonwealth's quasi-sovereign interest in the general well-being of its citizens. A State's interest in the well-being of its residents, which extends beyond mere physical interests to economic and commercial interests, also includes the State's substantial interest in securing its residents from the harmful effects of discrimination. This interest is peculiarly strong in the case of Puerto Rico simply because of the fact that invidious discrimination frequently occurs along ethnic lines. Alternatively, Puerto Rico has *parens patriae* standing to pursue its residents' interests in the Commonwealth's full and equal participation in the federal employment service scheme established by the laws involved here. Pp. 608–610.

632 F. 2d 365, affirmed.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the decision of the case. BRENNAN, J., filed a concurring opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 610.

Thomas J. Bacas argued the cause for petitioners. With him on the briefs was *S. Steven Karalekas*.

Paul A. Lenzini argued the cause and filed a brief for respondent.*

---

*Briefs of *amici curiae* urging affirmance were filed by *Francis X. Bellotti*, Attorney General, and *Anthony P. Sager*, Assistant Attorney General, for the Commonwealth of Massachusetts; by

JUSTICE WHITE delivered the opinion of the Court.

In this case, the Commonwealth of Puerto Rico seeks to bring suit in its capacity as *parens patriae* against petitioners for their alleged violations of federal law. Puerto Rico contends that those violations discriminated against Puerto Ricans and injured the Puerto Rican economy. The question presented here is whether Puerto Rico has standing to maintain this suit.

I

A

The factual background of this case involves the interaction of two federal statutes, the Wagner-Peyser Act, 48 Stat. 113, 29 U. S. C. § 49 *et seq.*, and the Immigration and Nationality Act of 1952, 66 Stat. 163, as amended, 8 U. S. C. § 1101 *et seq.* (1976 ed. and Supp. IV). The Wagner-Peyser Act was passed in 1933 in order to deal with the massive problem of unemployment resulting from the Depression. The Act establishes the United States Employment Service within the Department of Labor "[i]n order to promote the establishment and maintenance of a national system of public employment offices." 29 U. S. C. § 49. State agencies, which have been approved by the Secretary of Labor, are authorized to participate in the nationwide employment service.[1] § 49g. The Secretary is authorized to make "such rules and regulations as may be necessary" to accomplish the ends of the Act. § 49k. Federal regulations issued pursuant to that authority

---

Robert Abrams, Attorney General of New York, *Shirley Adelson Siegel*, Solicitor General, and *Peter Bienstock*, *Deborah Bachrach*, and *Daniel Berger*, Assistant Attorneys General, *Leroy Zimmerman*, Attorney General of Pennsylvania, *Frank P. Tuplin*, Deputy Attorney General, and *Paul E. Waters*, Executive Deputy Attorney General, for the State of New York et al.; and by *A. Douglas Melamed* for the Migrant Legal Action Program, Inc., et al.

[1] As used in the Act, the word "State" includes Puerto Rico. 29 U. S. C. § 49b(b). Puerto Rico's Department of Labor and Human Resources has been approved by the Secretary of Labor and participates in the federal-state system established by the Act.

have established an interstate clearance system to provide employers a means of recruiting nonlocal workers, when the supply of local workers is inadequate. 20 CFR § 602.2(c) (1981). If local workers are not available, a "clearance order" is sent through the Employment and Training Administration of the Department of Labor to other state agencies in order to give them an opportunity to meet the request.

Some of petitioners' obligations under the employment system established by the Wagner-Peyser Act stem from the Immigration and Nationality Act of 1952, insofar as it regulates the admission of nonimmigrant aliens into the United States. The latter Act authorizes the admission of temporary foreign workers into the United States only "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U. S. C. § 1101(a)(15)(H)(ii). The Attorney General is charged with determining whether entry of foreign workers would meet this standard, "upon petition of the importing employer." 8 U. S. C. § 1184(c). He is to make this determination "after consultation with appropriate agencies of the Government." *Ibid.* The Attorney General has delegated this responsibility to the Commissioner of Immigration and Naturalization, 8 CFR § 2.1 (1982), who, in turn, relies on the Secretary of Labor for the initial determinations. 8 CFR § 214.2(h)(3) (1982).[2] To meet this responsibility, the Secretary of Labor relies upon the employment referral system established under the Wagner-Peyser Act.

Any employer who wants to employ temporary foreign agricultural laborers must first seek domestic laborers for the openings through use of the interstate clearance system.

---

[2] "Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101(a)(15)(H)(ii)." 8 CFR § 214.2(h)(3)(i) (1982).

The employer who anticipates a need for foreign laborers must file an application with the local public employment office, including a copy of the job offer. 20 CFR §§655.201 (a)(1), (b)(1) (1981). The application must be filed in sufficient time to allow the agency to recruit through the interstate clearance system for 60 days prior to the estimated date of the start of employment. §655.201(c). The regulations further provide that the employer must include assurances that the job opportunity is "open to all qualified U. S. workers without regard to race, color, national origin, sex, or religion, and is open to U. S. workers with handicaps who are qualified to perform the work," and that the employer will continue to seek United States workers until the foreign workers have departed for the employer's place of employment. §§655.203(c), (d).[3] Finally, the regulations require that "each employer's job offer to U. S. workers must offer U. S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers." §655.202(a). Similarly, the employer may not impose obligations or restrictions on domestic workers that are not, or will not be, imposed on foreign workers. *Ibid.*

The obvious point of this somewhat complicated statutory and regulatory framework is to provide two assurances to United States workers, including the citizens of Puerto Rico. First, these workers are given a preference over foreign workers for jobs that become available within this country. Second, to the extent that foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected, nor are United States workers to be discriminated against in favor of foreign workers.

---

[3] There is a further requirement that the employer continue to provide an opportunity for employment to any qualified United States worker who applies for a position from the time the foreign workers depart for the employer's place of employment until the time that 50 percent of the period of the work contract has elapsed. 20 CFR §655.203(e) (1981).

B

The particular facts of this case involve the 1978 apple harvest on the east coast. That was apparently a good year for apples, resulting in a substantial need for temporary farm laborers to pick the crop. To meet this need the apple growers filed clearance orders with their state employment agencies. Through the system described above, a total of 2,318 job openings were transmitted to Puerto Rico on August 2, 1978. As of August 14, which marked the end of the 60-day "availability" period, *supra*, at 596, the Commonwealth Department of Labor had recruited 1,094 Puerto Rican workers. Puerto Rican workers for the remaining openings were subsequently recruited. As stated in Puerto Rico's complaint:

> "Of this total number of 2,318 Puerto Rican workers, only 992 actually arrived on the mainland. The remainder never left Puerto Rico because of oral advice from the United States Department of Labor requesting cancellation of remaining flights because many of the defendant growers had refused to employ Puerto Rican workers who had already arrived. Of the 992 workers who arrived at the orchards, 420 came to Virginia orchards. Of these 420 workers, fewer than 30 had employment three weeks later, the growers having refused to employ most of these workers and having dismissed most of the rest within a brief time for alleged unproductivity." App. 17–18.

Puerto Rico filed this suit on January 11, 1979, naming as defendants numerous individuals and companies engaged in the apple industry in Virginia.[4] Of the 2,318 job requests forwarded to Puerto Rico, respondent alleged that 787 of these had come from the named Virginia growers. In three counts, the complaint alleged that the defendants had violated the Wagner-Peyser Act, the Immigration and Nationality Act of 1952, and various federal regulations implementing those statutes, by failing to provide employment for qualified Puerto Rican migrant farmworkers, by subjecting those Puerto Rican workers that were employed to working conditions more burdensome than those established for temporary foreign workers,[5] and by improperly terminating employment of Puerto Rican workers. Alleging that this discrimination against Puerto Rican farmworkers deprived "the Commonwealth of Puerto Rico of its right to effectively participate in the benefits of the Federal Employment Service System of which it is a part" and thereby caused irreparable injury to the Commonwealth's efforts "to promote opportunities for profitable employment for Puerto Rican laborers and to reduce unemployment in the Commonwealth," respondent sought declaratory relief with respect to the past practices of petitioners and injunctive relief requiring petitioners to conform to the relevant federal statutes and regulations in the future.

---

[4] The complaint named 51 defendants: 32 apple growers and 19 officers, partners or employees of the apple growers.

---

[5] The theory of the complaint was that the apple growers were discriminating against the Puerto Ricans in favor of Jamaican workers. In August 1978, apple growers in several States, including Virginia, filed suit in Federal District Court seeking an injunction against the United States Secretary of Labor, the Commissioner of the Immigration and Naturalization Service, and their subordinates, to permit the recruitment and employment of foreign workers. Puerto Rico was allowed to intervene in this suit to represent the interests of its residents in these work opportunities. The growers complained that the federal employment service had not produced sufficient laborers to assure that the harvest, which was about to begin, could be successfully accomplished with sufficient speed. The District Court issued a preliminary injunction ordering that a certain number of foreign workers be allowed to enter this country to pick apples. *Frederick County Fruit Growers Assn., Inc.* v. *Marshall*, No. 78-0086(H) (WD Va., Aug. 31, 1978). The Jamaicans secured entry under this order. Prior to issuing this injunction, however, the court was assured by the apple growers that they recognized their obligation to give priority to Puerto Rican workers, notwithstanding the court order. Puerto Rico's complaint was founded on the charge that the apple growers failed to meet this commitment and, thus, failed to meet their obligations under federal law.

Petitioners responded with a motion to dismiss, asserting that respondent lacked standing to bring this action. Although the District Court held that the Commonwealth of Puerto Rico is capable of asserting *parens patriae* interests in general, it agreed with petitioners' contention that no such action could be maintained under the circumstances of this case. In particular, the District Court relied upon the relatively small number of individuals directly involved—some 787 out of a total population of close to 3 million—and the slight impact upon the general economy of Puerto Rico that the loss of this number of temporary jobs could have.

A divided panel of the Court of Appeals for the Fourth Circuit reversed.[6] 632 F. 2d 365 (1980). The majority held that the District Court had focused too narrowly on those directly involved, ignoring those that were indirectly affected by petitioners' alleged actions. Noting the serious dimensions of the unemployment problem in Puerto Rico and the general condition of its economy,[7] the court stated that "[d]eliberate efforts to stigmatize the labor force as inferior carry a universal sting" and the "inability of the United States government . . . to grant Puerto Ricans equal treatment with other citizens or even with foreign temporary workers must certainly have an effect which permeates the entire island of Puerto Rico." *Id.*, at 370. These indirect effects on the interests of "a substantial portion of its citizenry" were sufficient, in its view, to support a *parens patriae* action. *Ibid.*

We granted certiorari to determine whether Puerto Rico could maintain a *parens patriae* action here, despite the small number of individuals directly involved. 454 U. S. 1079 (1981).

---

[6] The dissenting judge agreed with the analysis of the District Court.

[7] In September 1978, 18.5% of the adults in the Puerto Rican labor force were unemployed. Rural unemployment stood at 23%.

II

Parens patriae means literally "parent of the country."[8] The *parens patriae* action has its roots in the common-law concept of the "royal prerogative."[9] The royal prerogative included the right or responsibility to take care of persons who "are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property."[10] At a fairly early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative: "This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . . often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." *Mormon Church* v. *United States*, 136 U. S. 1, 57 (1890).

This common-law approach, however, has relatively little to do with the concept of *parens patriae* standing that has developed in American law. That concept does not involve the State's stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved—*i. e.*, if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine. See *Pennsylvania* v. *New Jersey*, 426 U. S. 660 (1976); *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387 (1938); *Oklahoma* v. *Atchison, T. & S. F. R. Co.*, 220 U. S.

---

[8] "'*Parens patriae*,' literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability." Black's Law Dictionary 1003 (5th ed. 1979).

[9] See *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 257 (1972); G. Curtis, The Checkered Career of *Parens Patriae*, 25 DePaul L. Rev. 895, 896 (1976); Black's, *supra*.

[10] J. Chitty, Prerogatives of the Crown 155 (1820), quoted in Curtis, *supra*, at 896.

277 (1911). Rather, to have such standing the State must assert an injury to what has been characterized as a "quasi-sovereign" interest, which is a judicial construct that does not lend itself to a simple or exact definition. Its nature is perhaps best understood by comparing it to other kinds of interests that a State may pursue and then by examining those interests that have historically been found to fall within this category.

Two sovereign interests are easily identified: First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal; second, the demand for recognition from other sovereigns—most frequently this involves the maintenance and recognition of borders. The former is regularly at issue in constitutional litigation. The latter is also a frequent subject of litigation, particularly in this Court:

> "The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. . . . The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative." *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 450 (1945).

Not all that a State does, however, is based on its sovereign character. Two kinds of nonsovereign interests are to be distinguished. First, like other associations and private parties, a State is bound to have a variety of proprietary interests. A State may, for example, own land or participate in a business venture. As a proprietor, it is likely to have the same interests as other similarly situated proprietors. And like other such proprietors it may at times need to pursue those interests in court. Second, a State may, for a variety of reasons, attempt to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest. Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party.

Quasi-sovereign interests stand apart from all three of the above: They are not sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party. They consist of a set of interests that the State has in the well-being of its populace. Formulated so broadly, the concept risks being too vague to survive the standing requirements of Art. III: A quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant. The vagueness of this concept can only be filled in by turning to individual cases.

That a *parens patriae* action could rest upon the articulation of a "quasi-sovereign" interest was first recognized by this Court in *Louisiana* v. *Texas*, 176 U. S. 1 (1900). In that case, Louisiana unsuccessfully sought to enjoin a quarantine maintained by Texas officials, which had the effect of limiting trade between Texas and the port of New Orleans. The Court labeled Louisiana's interest in the litigation as that of *parens patriae*, and went on to describe that interest by distinguishing it from the sovereign and proprietary interests of the State:

> "Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the

> matters complained of affect her citizens at large." *Id.*, at 19.[11]

Although Louisiana was unsuccessful in that case in pursuing the commercial interests of its residents, a line of cases followed in which States successfully sought to represent the interests of their citizens in enjoining public nuisances. *North Dakota* v. *Minnesota*, 263 U. S. 365 (1923); *Wyoming* v. *Colorado*, 259 U. S. 419 (1922); *New York* v. *New Jersey*, 256 U. S. 296 (1921); *Kansas* v. *Colorado*, 206 U. S. 46 (1907); *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907); *Kansas* v. *Colorado*, 185 U. S. 125 (1902); *Missouri* v. *Illinois*, 180 U. S. 208 (1901).

In the earliest of these, *Missouri* v. *Illinois*, Missouri sought to enjoin the defendants from discharging sewage in such a way as to pollute the Mississippi River in Missouri. The Court relied upon an analogy to independent countries in order to delineate those interests that a State could pursue in federal court as *parens patriae*, apart from its sovereign and proprietary interests:[12]

> "It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened,

---

[11] Justice Harlan, in a concurring opinion, specifically rejected the idea that Louisiana had standing to pursue more than its sovereign and proprietary interests: "I am of opinion that the State of Louisiana, in its sovereign or corporate capacity, cannot bring any action in this court on account of the matters set forth in its bill. The case involves no property interest of that State. Nor is Louisiana charged with any duty, nor has it any power, to regulate interstate commerce." 176 U. S., at 24.

[12] Admittedly, the discussion here and in the other cases discussed below focused on the *parens patriae* question in the context of a suit brought in the original jurisdiction of this Court. There may indeed be special considerations that call for a limited exercise of our jurisdiction in such instances; these considerations may not apply to a similar suit brought in federal district court.

> the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering." *Id.*, at 241.

This analogy to an independent country was also articulated in *Georgia* v. *Tennessee Copper Co.*, *supra*, at 237, a case involving air pollution in Georgia caused by the discharge of noxious gasses from the defendant's plant in Tennessee. Justice Holmes, writing for the Court, described the State's interest under these circumstances as follows:

> "[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. . . .
>
> ". . . When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests."

Both the Missouri case and the Georgia case involved the State's interest in the abatement of public nuisances, instances in which the injury to the public health and comfort was graphic and direct. Although there are numerous examples of such *parens patriae* suits, *e. g.*, *North Dakota* v. *Minnesota*, *supra* (flooding); *New York* v. *New Jersey*, *supra* (water pollution); *Kansas* v. *Colorado*, 185 U. S. 125 (1902) (diversion of water), *parens patriae* interests extend well beyond the prevention of such traditional public nuisances.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), for example, Pennsylvania was recognized as a proper party to represent the interests of its residents in maintaining access to natural gas produced in West Virginia:

> "The private consumers in each State . . . constitute a substantial portion of the State's population. Their health, comfort and welfare are seriously jeopardized by the threatened withdrawal of the gas from the interstate stream. This is a matter of grave public concern in which the State, as representative of the public, has an interest apart from that of the individuals affected. It is not merely a remote or ethical interest but one which is immediate and recognized by law." *Id.*, at 592.

The public nuisance and economic well-being lines of cases were specifically brought together in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945), in which Georgia alleged that some 20 railroads had conspired to fix freight rates in a manner that discriminated against Georgia shippers in violation of the federal antitrust laws:

> "If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. . . . [Trade barriers] may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. . . . Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her

> sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected." *Id.*, at 450–451.[13]

---

[13] The Court also said, 324 U. S., at 450, 451–452:

"It seems to us clear that under the authority of these cases Georgia may maintain this suit as *parens patriae* acting on behalf of her citizens though here, as in *Georgia* v. *Tennessee Copper Co.*, [206 U. S., at] 237, we treat the injury to the State as proprietor merely as a 'makeweight.' The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between States and between a State and citizens of another State. See *Missouri* v. *Illinois*, [180 U. S., at] 219–224; *Virginia* v. *West Virginia*, 246 U. S. 565, 599. Trade barriers, recriminations, intense commercial rivalries had plagued the colonies. The traditional methods available to a sovereign for the settlement of such disputes were diplomacy and war. Suit in this Court was provided as an alternative. *Missouri* v. *Illinois*, *supra*, p. 241; *Georgia* v. *Tennessee Copper Co.*, *supra*, p. 237.

. . . . .

"*Oklahoma* v. *Atchison, T. & S. F. R. Co.*, [220 U. S. 277 (1911)], is not opposed to this view. In that case, the defendant railroad company had obtained a grant from Congress to locate and maintain a railway line through the Indian Territory out of which the State of Oklahoma was later formed. The federal act provided certain maximum transportation rates which the company might charge. Oklahoma sued to cancel the grant, to have the property granted decreed to be in the State of Oklahoma as *cestui que trust*, to enjoin the defendant from operating a railroad in the State, and to enjoin *pendente lite* the exaction of greater rates than the maximum rates specified. The Court construed the Act of Congress as subjecting the rates to federal control until the territory became a part of a State, at which time the rates became subject to state control. The Court held that our original jurisdiction could not be invoked by a State merely because its citizens were injured. We adhere to that decision. It does not control the present one. This is no attempt to utilize our original jurisdiction in substitution for the established methods of enforcing local law. This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers."

This summary of the case law involving *parens patriae* actions leads to the following conclusions. In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i. e.*, the State must be more than a nominal party. The State must express a quasi-sovereign interest. Although the articulation of such interests is a matter for case-by-case development—neither an exhaustive formal definition nor a definitive list of qualifying interests can be presented in the abstract—certain characteristics of such interests are so far evident. These characteristics fall into two general categories. First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.

The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population. One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.[14]

Distinct from but related to the general well-being of its residents, the State has an interest in securing observance of the terms under which it participates in the federal system. In the context of *parens patriae* actions, this means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system. Thus, the State need not wait for the Federal Government to vindicate the State's interest in the removal of barriers to the participation by its residents in the free flow of interstate commerce. See *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923). Similarly, federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945) (federal antitrust laws); *Maryland* v. *Louisiana*, 451 U. S. 725 (1981) (Natural Gas Act). Once again, we caution that the State must be more than a nominal party. But a State does have an interest, independent of the benefits that might accrue to any particular individual, in assuring that the benefits of the federal system are not denied to its general population.

---

[14] Obviously, a State might make use of "private bills" in order to use its legislative power to aid particular individuals. If the analogy spoken of above is to this form of legislative action, then the State remains merely a nominal party from the perspective of a federal court; it has failed to articulate any general interest, apart from that of the individual involved.

We turn now to the allegations of the complaint to determine whether they satisfy either or both of these criteria.[15]

III

The complaint presents two fundamental contentions. First, it alleges that the petitioners discriminated against Puerto Ricans in favor of foreign laborers. Second, it alleges that Puerto Ricans were denied the benefits of access to domestic work opportunities that the Wagner-Peyser Act and the Immigration and Nationality Act of 1952 were designed to secure for United States workers. We find each of these allegations to fall within the Commonwealth's quasi-sovereign interests and, therefore, each will support a *parens patriae* action.

---

[15] Although we have spoken throughout of a "State's" standing as *parens patriae*, we agree with the lower courts and the parties that the Commonwealth of Puerto Rico is similarly situated to a State in this respect: It has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State.

Petitioners contend that at most there were only 787 job opportunities at stake in Virginia and that this number of temporary jobs could not have a substantial direct or indirect effect on the Puerto Rican economy. We believe that this is too narrow a view of the interests at stake here. Just as we have long recognized that a State's interests in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests, we recognize a similar state interest in securing residents from the harmful effects of discrimination. This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils. This interest is peculiarly strong in the case of Puerto Rico simply because of the unfortunate fact that invidious discrimination frequently occurs along ethnic lines. Puerto Rico's situation differs somewhat from the States in this regard—not in theory but in fact—simply because this country has for the most part been spared the evil of invidious discrimination based on state lines. Were this to come to pass, however, we have no doubt that a State could seek, in the federal courts, to protect its residents from such discrimination to the extent that it violates federal law. Puerto Rico claims that it faces this problem now. Regardless of the possibly limited effect of the alleged financial loss at issue here, we agree with the Court of Appeals that "[d]eliberate efforts to stigmatize the labor force as inferior carry a universal sting." 632 F. 2d, at 370.

Alternatively, we find that Puerto Rico does have *parens patriae* standing to pursue the interests of its residents in the Commonwealth's full and equal participation in the federal employment service scheme established pursuant to the Wagner-Peyser Act and the Immigration and Nationality Act of 1952. Unemployment among Puerto Rican residents is surely a legitimate object of the Commonwealth's concern. Just as it may address that problem through its own legislation, it may also seek to assure its residents that they will have the full benefit of federal laws designed to address this problem. The Commonwealth's position in this respect is not distinguishable from that of Georgia when it sought the protection of the federal antitrust laws in order to eliminate freight rates that discriminated against Georgia shippers, *Georgia* v. *Pennsylvania R. Co.*, *supra*, or from that of Maryland when it sought to secure the benefits of the Natural Gas Act for its residents, *Maryland* v. *Louisiana*, *supra*. Indeed, the fact that the Commonwealth participates directly in the operation of the federal employment scheme makes even more compelling its *parens patriae* interest in assuring that the scheme operates to the full benefit of its residents.[16]

For these reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring.

As the Court notes, *ante*, at 603, n. 12, the question whether a State can bring a *parens patriae* action within the original jurisdiction of this Court may well turn on considerations quite different from those implicated where the State seeks to press a *parens patriae* claim in the district courts. The Framers, in establishing original jurisdiction in this Court for suits "in which a State shall be a Party," Art. III, § 2, cl. 2, and Congress, in implementing the grant of original jurisdiction with respect to suits between States, 28 U. S. C. § 1251(a) (1976 ed., Supp. IV), may well have conceived of a somewhat narrower category of cases as presenting issues appropriate for initial determination in this Court than the full range of cases to which a State may have an interest cognizable by a federal court. The institutional limits on the Court's ability to accommodate such suits accentuates the need for more restrictive access to the original docket. In addition, because the judicial power of the United States does not extend to suits "commenced or prosecuted against one of the United States by Citizens of another State," U. S. Const., Amdt. 11, where one State brings a suit *parens patriae* against another *State*, a more circumspect inquiry may be required in order to ensure that the provisions of the Eleventh Amendment are not being too easily circumvented by the device of the State's bringing suit on behalf of some private party. Of course, none of the concerns that might counsel for a restrictive approach to the question of *parens patriae* standing is present in this case.

---

[16] A State does not have standing as *parens patriae* to bring an action against the Federal Government. *Massachusetts* v. *Mellon*, 262 U. S. 447, 485–486 (1923) ("While the State, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri* v. *Illinois*, 180 U. S. 208, 241), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*"). Here, however, the Commonwealth is seeking to secure the federally created interests of its residents against private defendants. Indeed, the Secretary of Labor has represented that he has no objection to Puerto Rico's standing as *parens patriae* under these circumstances. See Brief for the Secretary of Labor as *Amicus Curiae* in *Puerto Rico* v. *Bramkamp*, No. 724, Docket 79–7777 (CA2).

In cases such as the present one, I can discern no basis either in the Constitution or in policy for denying a State the opportunity to vindicate the federal rights of its citizens. At the *very* least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations. A private organization may bring suit to vindicate its own concrete interest in performing those activities for which it was formed. *E. g., Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 378–379 (1982);[1] *Arlington Heights*

---

[1] Indeed, in *Havens* we held that interference with HOME's "ability to provide counseling and referral services," 455 U. S., at 379, provided it with standing to vindicate claims under the Fair Housing Act of 1968. In this case, the alleged violations of the Wagner-Peyser Act, 29 U. S. C. § 49

v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 263 (1977); *NAACP* v. *Button*, 371 U. S. 415, 428 (1963). See also *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 109–111 (1979) (standing of municipality premised on diminished tax base and other "harms flowing from the realities of a racially segregated community"). Cf. *Sierra Club* v. *Morton*, 405 U. S. 727, 739 (1972).[2] There is no doubt that Puerto Rico's interest in this litigation compares favorably to interests of the private organizations, and municipality, in the cases cited above.

More significantly, a State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention. I know of nothing—except the Constitution or overriding federal law—that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest.

With these considerations in mind, I join the opinion of the Court.

---

et seq., directly interfere with Puerto Rico's ability to perform the job referral service that it has undertaken as part of its sovereign responsibility to its citizens.

[2] A private organization may also maintain a federal-court action on behalf of its members. *E. g.*, *NAACP* v. *Button*, 371 U. S. 415, 428 (1963); *National Motor Freight Assn.* v. *United States*, 372 U. S. 246 (1963) *(per curiam)*. See *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 341–345 (1977).

ROGERS ET AL. v. LODGE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-2100. Argued February 23, 1982—Decided July 1, 1982

Burke County, Ga., a large, predominately rural county, has an at-large system for electing members of its governing Board of Commissioners. No Negro has ever been elected to the Board. Appellee black citizens of the county filed a class action in Federal District Court, alleging that the at-large system of elections violated, *inter alia*, appellees' Fourteenth and Fifteenth Amendment rights by diluting the voting power of black citizens. Finding that blacks have always made up a substantial majority of the county's population but that they are a minority of the registered voters, that there had been bloc voting along racial lines, and that past discrimination had restricted the present opportunity of blacks to participate effectively in the political process, the District Court held that although the state policy behind the at-large electoral system was "neutral in origin," the policy was being maintained for invidious purposes in violation of appellees' Fourteenth and Fifteenth Amendment rights. The court then ordered the county to be divided into districts for purposes of electing County Commissioners. The Court of Appeals affirmed, holding that the District Court properly required appellees to prove that the at-large system was maintained for a discriminatory purpose, that the District Court's findings were not clearly erroneous, and that its conclusion that the at-large system was maintained for invidious purposes was "virtually mandated by the overwhelming proof."

Held:

1. The Court of Appeals did not err in concluding that the District Court applied the proper legal standard, where it appears that the District Court demonstrated its understanding of the controlling standard by observing that a determination of discriminatory intent was "a requisite to a finding of unconstitutional vote dilution" under the Fourteenth and Fifteenth Amendments. Pp. 616–622.

2. Where neither the District Court's ultimate findings of intentional discrimination nor its subsidiary findings of fact appear to be clearly erroneous and such findings were agreed to by the Court of Appeals, this Court will not disturb the findings. Pp. 622–627.

3. Nor is there any reason to overturn the relief ordered by the District Court, where neither that court nor the Court of Appeals discerned

any special circumstances that would militate against utilizing single-member districts. Pp. 627–628.

639 F. 2d 1358, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 628. STEVENS, J., filed a dissenting opinion, *post*, p. 631.

E. Freeman Leverett argued the cause for appellants. With him on the briefs was *Preston B. Lewis*.

David F. Walbert argued the cause for appellees. With him on the brief were *Robert W. Cullen*, *Laughlin McDonald*, *Christopher Coates*, and *Neil Bradley*.*

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the at-large system of elections in Burke County, Ga., violates the Fourteenth Amendment rights of Burke County's black citizens.

I

Burke County is a large, predominately rural county located in eastern Georgia. Eight hundred and thirty-one square miles in area,[1] it is approximately two-thirds the size of the State of Rhode Island. According to the 1980 census, Burke County had a total population of 19,349, of whom 10,385, or 53.6%, were black.[2] The average age of blacks

---

*Briefs of *amici curiae* urging affirmance were filed by *Arthur Kinoy* and *Robert Boehm* for the Center for Constitutional Rights; by *Marvin S. Arrington*, *Bobby L. Hill*, *John R. Myer*, and *Margrett Ford* for the Georgia Association of Black Elected Officials et al.; by *William L. Robinson* and *Frank R. Parker* for the Lawyers' Committee for Civil Rights Under Law; and by *Jack Greenberg*, *James M. Nabrit III*, and *Lani Guinier* for the NAACP Legal Defense and Educational Fund, Inc., et al.

[1] U. S. Dept. of Commerce, Bureau of the Census, County and City Data Book 1977, p. 90 (1978).

[2] U. S. Dept. of Commerce, Bureau of the Census, 1980 Census of Population and Housing, PHC80–V–12, p. 5 (Mar. 1981). In 1930, Burke County had a total population of 29,224, of whom 22,698 or 78% were black.

living there is lower than the average age of whites and therefore whites constitute a slight majority of the voting age population. As of 1978, 6,373 persons were registered to vote in Burke County, of whom 38% were black.[3]

The Burke County Board of Commissioners governs the county. It was created in 1911, see 1911 Ga. Laws 310–311, and consists of five members elected at large to concurrent 4-year terms by all qualified voters in the county. The county has never been divided into districts, either for the purpose of imposing a residency requirement on candidates or for the purpose of requiring candidates to be elected by voters residing in a district. In order to be nominated or elected, a candidate must receive a majority of the votes cast in the primary or general election, and a runoff must be held if no candidate receives a majority in the first primary or general election. Ga. Code § 34–1513 (Supp. 1980). Each candidate must run for a specific seat on the Board, Ga. Code § 34–1015 (1978), and a voter may vote only once for any candidate. No Negro has ever been elected to the Burke County Board of Commissioners.

Appellees, eight black citizens of Burke County, filed this suit in 1976 in the United States District Court for the Southern District of Georgia. The suit was brought on behalf of all black citizens in Burke County. The class was certified in 1977. The complaint alleged that the county's system of at-large elections violates appellees' First, Thirteenth, Fourteenth, and Fifteenth Amendment rights, as well as their rights under 42 U. S. C. §§ 1971, 1973, and 1983, by diluting the voting power of black citizens. Following a bench trial at which both sides introduced extensive evidence, the court issued an order on September 29, 1978, stating that appellees were entitled to prevail and ordering that Burke County be

---

U. S. Dept. of Commerce, Bureau of the Census, II Characteristics of the Population, pt. 2, p. 229 (1943). The percentage of blacks in the total population of Burke County has steadily diminished over the last 50 years.

[3] App. to Juris. Statement 72a.

divided into five districts for purposes of electing County Commissioners. App. to Juris. Statement 62a. The court later issued detailed findings of fact and conclusions of law in which it stated that while the present method of electing County Commissioners was "racially neutral when adopted, [it] is being *maintained* for invidious purposes" in violation of appellees' Fourteenth and Fifteenth Amendment rights. *Id.*, at 71a, 96a.

The Court of Appeals affirmed. *Lodge* v. *Buxton*, 639 F. 2d 1358 (CA5 1981). It stated that while the proceedings in the District Court took place prior to the decision in *Mobile* v. *Bolden*, 446 U. S. 55 (1980), the District Court correctly anticipated *Mobile* and required appellees to prove that the at-large voting system was maintained for a discriminatory purpose. 639 F. 2d, at 1375–1376. The Court of Appeals also held that the District Court's findings were not clearly erroneous, and that its conclusion that the at-large system was maintained for invidious purposes was "virtually mandated by the overwhelming proof." *Id.*, at 1380. We noted probable jurisdiction, 454 U. S. 811 (1981), and now affirm.[4]

II

At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts. The minority's voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines. While multimember districts have been challenged for

---

[4] The District Court's judgment was stayed pending appeal to the Court of Appeals. 439 U. S. 948 (1978). The Court of Appeals stayed its mandate on April 6, 1981, pending disposition of the case here.

"their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party," *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–159 (1971), this Court has repeatedly held that they are not unconstitutional *per se*. *Mobile* v. *Bolden, supra*, at 66; *White* v. *Regester*, 412 U. S. 755, 765 (1973); *Whitcomb* v. *Chavis, supra*, at 142. The Court has recognized, however, that multimember districts violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial discrimination" by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population. *Whitcomb* v. *Chavis, supra*, at 149. See also *White* v. *Regester, supra*, at 765. Cases charging that multimember districts unconstitutionally dilute the voting strength of racial minorities are thus subject to the standard of proof generally applicable to Equal Protection Clause cases. *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977), made it clear that in order for the Equal Protection Clause to be violated, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington* v. *Davis, supra*, at 240. Neither case involved voting dilution, but in both cases the Court observed that the requirement that racially discriminatory purpose or intent be proved applies to voting cases by relying upon, among others, *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), a districting case, to illustrate that a showing of discriminatory intent has long been required in *all* types of equal protection cases charging racial discrimination. *Arlington Heights, supra*, at 265; *Washington* v. *Davis, supra*, at 240.[5]

---

[5] Purposeful racial discrimination invokes the strictest scrutiny of adverse differential treatment. Absent such purpose, differential impact is subject only to the test of rationality. *Washington* v. *Davis*, 426 U. S., at 247–248.

Arlington Heights and *Washington* v. *Davis* both rejected the notion that a law is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. *Arlington Heights, supra,* at 265; *Washington* v. *Davis,* 426 U. S., at 242. However, both cases recognized that discriminatory intent need not be proved by direct evidence. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Ibid.* Thus determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights, supra,* at 266.

In *Mobile* v. *Bolden, supra,* the Court was called upon to apply these principles to the at-large election system in Mobile, Ala. Mobile is governed by three commissioners who exercise all legislative, executive, and administrative power in the municipality. 446 U. S., at 59. Each candidate for the City Commission runs for one of three numbered posts in an at-large election and can only be elected by a majority vote. *Id.,* at 59–60. Plaintiffs brought a class action on behalf of all Negro citizens of Mobile alleging that the at-large scheme diluted their voting strength in violation of several statutory and constitutional provisions. The District Court concluded that the at-large system "violates the constitutional rights of the plaintiffs by improperly restricting their access to the political process," *Bolden* v. *Mobile,* 423 F. Supp. 384, 399 (SD Ala. 1976), and ordered that the commission form of government be replaced by a mayor and a nine-member City Council elected from single-member districts. *Id.,* at 404. The Court of Appeals affirmed. 571 F. 2d 238 (CA5 1978). This Court reversed.

Justice Stewart, writing for himself and three other Justices, noted that to prevail in their contention that the at-large voting system violates the Equal Protection Clause of the Fourteenth Amendment, plaintiffs had to prove the system was "'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'" 446 U. S., at 66, quoting *Whitcomb* v. *Chavis*, *supra*, at 149.[6] Such a requirement "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment," 446 U. S., at 66, and *White* v. *Regester* is consistent with that principle. 446 U. S., at 69. Another Justice agreed with the standard of proof recognized by the plurality. *Id.*, at 101 (WHITE, J., dissenting).

The plurality went on to conclude that the District Court had failed to comply with this standard. The District Court had analyzed plaintiffs' claims in light of the standard which had been set forth in *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636 (1975) *(per curiam)*.[7] *Zimmer* set out a list of factors[8] gleaned from

---

[6] With respect to the Fifteenth Amendment, the plurality held that the Amendment prohibits only direct, purposefully discriminatory interference with the freedom of Negroes to vote. "Having found that Negroes in Mobile 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of [the Fifteenth] Amendment in the present case." *Mobile* v. *Bolden*, 446 U. S., at 65. Three Justices disagreed with the plurality's basis for putting aside the Fifteenth Amendment. *Id.*, at 84, n. 3 (STEVENS, J., concurring in judgment); *id.*, at 102 (WHITE, J., dissenting); *id.*, at 125–135 (MARSHALL, J., dissenting). We express no view on the application of the Fifteenth Amendment to this case.

The plurality noted that plaintiffs' claim under § 2 of the Voting Rights Act, 79 Stat. 437, as amended, 42 U. S. C. § 1973, added nothing to their Fifteenth Amendment claim because the "legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." 446 U. S., at 60–61.

[7] We specifically affirmed the judgment below "without approval of the constitutional views expressed by the Court of Appeals." 424 U. S., at 638.

[8] The primary factors listed in *Zimmer* include a lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a tenuous state policy underlying the preference for

Whitcomb v. *Chavis*, *supra*, and *White* v. *Regester*, *supra*, that a court should consider in assessing the constitutionality of at-large and multimember district voting schemes. Under *Zimmer*, voting dilution is established "upon proof of the existence of an aggregate of these factors." 485 F. 2d, at 1305.

The plurality in *Mobile* was of the view that *Zimmer* was "decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient." 446 U. S., at 71. The plurality observed that while "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose," the mere existence of those criteria is not a substitute for a finding of discriminatory purpose. *Id.*, at 73. The District Court's standard in *Mobile* was likewise flawed. Finally, the plurality concluded that the evidence upon which the lower courts had relied was "insufficient to prove an unconstitutionally discriminatory purpose in the present case." *Ibid.* JUSTICE STEVENS rejected the intentional discrimination standard but concluded that the proof failed to satisfy the legal standard that in his view was the applicable rule. He therefore concurred in the judgment of reversal. Four other Justices, however, thought the evidence sufficient to satisfy the purposeful discrimination standard. One of them, JUSTICE BLACKMUN, nevertheless concurred in the Court's judgment because he believed an erroneous remedy had been imposed.

Because the District Court in the present case employed the evidentiary factors outlined in *Zimmer*, it is urged that

---

multimember or at-large districting, and the existence of past discrimination which precludes effective participation in the electoral process. 485 F. 2d, at 1305. Factors which enhance the proof of voting dilution are the existence of large districts, anti-single-shot voting provisions, and the absence of any provision for at-large candidates to run from geographic subdistricts. *Ibid.*

its judgment is infirm for the same reasons that led to the reversal in *Mobile*. We do not agree. First, and fundamentally, we are unconvinced that the District Court in this case applied the wrong legal standard. Not only was the District Court's decision rendered a considerable time after *Washington* v. *Davis* and *Arlington Heights*, but the trial judge also had the benefit of *Nevett* v. *Sides*, 571 F. 2d 209 (1978), where the Court of Appeals for the Fifth Circuit assessed the impact of *Washington* v. *Davis* and *Arlington Heights* and held that "a showing of racially motivated discrimination is a necessary element in an equal protection voting dilution claim . . . ." 571 F. 2d, at 219. The court stated that "[t]he ultimate issue in a case alleging unconstitutional dilution of the votes of a racial group is whether the districting plan under attack exists because it was intended to diminish or dilute the political efficacy of that group." *Id.*, at 226. The Court of Appeals also explained that although the evidentiary factors outlined in *Zimmer* were important considerations in arriving at the ultimate conclusion of discriminatory intent, the plaintiff is not limited to those factors. "The task before the fact finder is to determine, under all the relevant facts, in whose favor the 'aggregate' of the evidence preponderates. This determination is peculiarly dependent upon the facts of each case." 571 F. 2d, at 224 (footnote omitted).

The District Court referred to *Nevett* v. *Sides* and demonstrated its understanding of the controlling standard by observing that a determination of discriminatory intent is "a requisite to a finding of unconstitutional vote dilution" under the Fourteenth and Fifteenth Amendments. App. to Juris. Statement 68a. Furthermore, while recognizing that the evidentiary factors identified in *Zimmer* were to be considered, the District Court was aware that it was "not limited in its determination only to the *Zimmer* factors" but could consider other relevant factors as well. App. to Juris. Statement 70a. The District Court then proceeded to deal with what it considered to be the relevant proof and concluded that the at-large scheme of electing commissioners, "although racially neutral when adopted, is being *maintained* for invidious purposes." *Id.*, at 71a. That system "while neutral in origin . . . has been subverted to invidious purposes." *Id.*, at 90a. For the most part, the District Court dealt with the evidence in terms of the factors set out in *Zimmer* and its progeny, but as the Court of Appeals stated:

> "Judge Alaimo employed the constitutionally required standard . . . [and] did not treat the *Zimmer* criteria as absolute, but rather considered them only to the extent they were relevant to the question of discriminatory intent." 639 F. 2d, at 1376.

Although a tenable argument can be made to the contrary, we are not inclined to disagree with the Court of Appeals' conclusion that the District Court applied the proper legal standard.

III

A

We are also unconvinced that we should disturb the District Court's finding that the at-large system in Burke County was being maintained for the invidious purpose of diluting the voting strength of the black population. In *White* v. *Regester*, 412 U. S., at 769–770, we stated that we were not inclined to overturn the District Court's factual findings, "representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise." See also *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 468 (1979) (BURGER, C. J., concurring in judgment). Our recent decision in *Pullman-Standard* v. *Swint*, 456 U. S. 273 (1982), emphasizes the deference Federal Rule of Civil Procedure 52 requires reviewing courts to give a trial court's findings of fact. "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings . . . ." 456 U. S., at 287. The Court held that the issue of whether the differential impact of a seniority system resulted from an intent to discriminate on racial grounds "is a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." *Id.*, at 287–288. The *Swint* Court also noted that issues of intent are commonly treated as factual matters. *Id.*, at 288. We are of the view that the same clearly-erroneous standard applies to the trial court's finding in this case that the at-large system in Burke County is being maintained for discriminatory purposes, as well as to the court's subsidiary findings of fact. The Court of Appeals did not hold any of the District Court's findings of fact to be clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. See, *e. g.*, *Berenyi* v. *Information Director*, 385 U. S. 630, 635 (1967); *Blau* v. *Lehman*, 368 U. S. 403, 408–409 (1962); *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949). We agree with the Court of Appeals that on the record before us, none of the factual findings are clearly erroneous.

B

The District Court found that blacks have always made up a substantial majority of the population in Burke County, App. to Juris. Statement 66a, n. 3, but that they are a distinct minority of the registered voters. *Id.*, at 71a–72a. There was also overwhelming evidence of bloc voting along racial lines. *Id.*, at 72a–73a. Hence, although there had been black candidates, no black had ever been elected to the Burke County Commission. These facts bear heavily on the issue of purposeful discrimination. Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race. Because it is sensible to expect that at least some blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion. See *White* v. *Regester, supra,* at 766.

Under our cases, however, such facts are insufficient in themselves to prove purposeful discrimination absent other evidence such as proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice. *United Jewish Organizations* v. *Carey,* 430 U. S. 144, 167 (1977); *White* v. *Regester, supra,* at 765–766; *Whitcomb* v. *Chavis,* 403 U. S., at 149–150. See also *Mobile* v. *Bolden,* 446 U. S., at 66 (plurality opinion). Both the District Court and the Court of Appeals thought the supporting proof in this case was sufficient to support an inference of intentional discrimination. The supporting evidence was organized primarily around the factors which *Nevett* v. *Sides,* 571 F. 2d 209 (CA5 1978), had deemed relevant to the issue of intentional discrimination. These factors were primarily those suggested in *Zimmer* v. *McKeithen,* 485 F. 2d 1297 (CA5 1973).

The District Court began by determining the impact of past discrimination on the ability of blacks to participate effectively in the political process. Past discrimination was found to contribute to low black voter registration because, prior to the Voting Rights Act of 1965, blacks had been denied access to the political process by means such as literacy tests, poll taxes, and white primaries. The result was that "Black suffrage in Burke County was virtually non-existent." App. to Juris. Statement 71a. Black voter registration in Burke County has increased following the Voting Rights Act to the point that some 38% of blacks eligible to vote are registered to do so. *Id.,* at 72a. On that basis the District Court inferred that "past discrimination has had an adverse effect on black voter registration which lingers to this date." *Ibid.* Past discrimination against blacks in education also had the same effect. Not only did Burke County schools discriminate against blacks as recently as 1969, but also some schools still remain essentially segregated and blacks as a group have completed less formal education than whites. *Id.*, at 74a.

The District Court found further evidence of exclusion from the political process. Past discrimination had prevented blacks from effectively participating in Democratic Party affairs and in primary elections. Until this lawsuit was filed, there had never been a black member of the County Executive Committee of the Democratic Party. There were also property ownership requirements that made it difficult for blacks to serve as chief registrar in the county. There had been discrimination in the selection of grand jurors, the hiring of county employees, and in the appointments to boards and committees which oversee the county government. *Id.*, at 74a–76a. The District Court thus concluded that historical discrimination had restricted the present opportunity of blacks effectively to participate in the political process. Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.

Extensive evidence was cited by the District Court to support its finding that elected officials of Burke County have been unresponsive and insensitive to the needs of the black community,[9] which increases the likelihood that the political process was not equally open to blacks. This evidence ranged from the effects of past discrimination which still haunt the county courthouse to the infrequent appointment of blacks to county boards and committees; the overtly discriminatory pattern of paving county roads; the reluctance of the county to remedy black complaints, which forced blacks to take legal action to obtain school and grand jury desegregation; and the role played by the County Commissioners in the incorporation of an all-white private school to which they donated public funds for the purchase of band uniforms. *Id.*, at 77a–82a.

---

[9] The Court of Appeals held that "proof of unresponsiveness by the public body in question to the group claiming injury" is an *essential* element of a claim of voting dilution under the Fourteenth Amendment. 639 F. 2d, at 1375. Under our cases, however, unresponsiveness is an important element but only one of a number of circumstances a court should consider in determining whether discriminatory purpose may be inferred.

The District Court also considered the depressed socioeconomic status of Burke County blacks. It found that proportionately more blacks than whites have incomes below the poverty level. *Id.*, at 83a. Nearly 53% of all black families living in Burke County had incomes equal to or less than three-fourths of a poverty-level income. *Ibid.* Not only have blacks completed less formal education than whites, but also the education they have received "was qualitatively inferior to a marked degree." *Id.*, at 84a. Blacks tend to receive less pay than whites, even for similar work, and they tend to be employed in menial jobs more often than whites. *Id.*, at 85a. Seventy-three percent of houses occupied by blacks lacked all or some plumbing facilities; only 16% of white-occupied houses suffered the same deficiency. *Ibid.* The District Court concluded that the depressed socioeconomic status of blacks results in part from "the lingering effects of past discrimination." *Ibid.*

Although finding that the state policy behind the at-large electoral system in Burke County was "neutral in origin," the District Court concluded that the policy "has been subverted to invidious purposes." *Id.*, at 90a. As a practical matter, maintenance of the state statute providing for at-large elections in Burke County is determined by Burke County's state representatives, for the legislature defers to their wishes on matters of purely local application. The court found that Burke County's state representatives "have retained a system which has minimized the ability of Burke County Blacks to participate in the political system." *Ibid.*

The trial court considered, in addition, several factors which this Court has indicated enhance the tendency of multimember districts to minimize the voting strength of racial minorities. See *Whitcomb* v. *Chavis*, 403 U. S., at 143–144. It found that the sheer geographic size of the county, which is nearly two-thirds the size of Rhode Island, "has made it more difficult for Blacks to get to polling places or to campaign for office." App. to Juris. Statement 91a. The court concluded, as a matter of law, that the size of the county tends to impair the access of blacks to the political process. *Id.*, at 92a. The majority vote requirement, Ga. Code § 34–1513 (Supp. 1980), was found "to submerge the will of the minority" and thus "deny the minority's access to the system." App. to Juris. Statement 92a. The court also found the requirement that candidates run for specific seats, Ga. Code § 34–1015 (1978), enhances appellees' lack of access because it prevents a cohesive political group from concentrating on a single candidate. Because Burke County has no residency requirement, "[a]ll candidates could reside in Waynesboro, or in 'lilly-white' *[sic]* neighborhoods. To that extent, the denial of access becomes enhanced." App. to Juris. Statement 93a.

None of the District Court's findings underlying its ultimate finding of intentional discrimination appears to us to be clearly erroneous; and as we have said, we decline to overturn the essential finding of the District Court, agreed to by the Court of Appeals, that the at-large system in Burke County has been maintained for the purpose of denying blacks equal access to the political processes in the county. As in *White* v. *Regester*, 412 U. S., at 767, the District Court's findings were "sufficient to sustain [its] judgment . . . and, on this record, we have no reason to disturb them."

IV

We also find no reason to overturn the relief ordered by the District Court. Neither the District Court nor the Court of Appeals discerned any special circumstances that would militate against utilizing single-member districts. Where "a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.'" *Milliken* v. *Bradley*, 433 U. S. 267, 282 (1977) (emphasis deleted), quoting *Milliken* v. *Bradley*, 418 U. S. 717, 738 (1974).[10]

The judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

I

Mobile v. *Bolden*, 446 U. S. 55 (1980), establishes that an at-large voting system must be upheld against constitutional attack unless maintained for a discriminatory purpose. In *Mobile* we reversed a finding of unconstitutional vote dilution because the lower courts had relied on factors insufficient as a matter of law to establish discriminatory intent. See *id.*, at 73 (plurality opinion of Stewart, J.). The District Court and Court of Appeals in this case based their findings of unconstitutional discrimination on the same factors held insufficient in *Mobile*. Yet the Court now finds their conclusion unexceptionable. The *Mobile* plurality also affirmed that the concept of "intent" was no mere fiction, and held that the District Court had erred in "its failure to identify the state officials whose intent it considered relevant." *Id.*, at 74, n. 20. Although the courts below did not answer that question in this case, the Court today affirms their decision.

---

[10] Appellants contend that the District Court should not have divided Burke County into five districts but should have allowed appellants to devise a plan for subdividing the county and to submit their plan for preclearance under § 5 of the Voting Rights Act, 79 Stat. 439, as amended, 42 U. S. C. § 1973c. This contention was not properly raised in the Court of Appeals and was not addressed by that court. We therefore do not address it. See *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970).

Appellants also contend that the doctrine of unconstitutional dilution of voting rights arising from an at-large election system does not apply to county governing bodies. We find no merit to this contention, having previously affirmed a judgment that at-large elections for the governing body of a parish (county) unconstitutionally diluted black voting strength. *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636 (1976).

Whatever the wisdom of *Mobile*, the Court's opinion cannot be reconciled persuasively with that case. There are some variances in the largely sociological evidence presented in the two cases. But *Mobile* held that this *kind* of evidence was not enough. Such evidence, we found in *Mobile*, did not merely fall short, but "fell *far* short[,] of showing that [an at-large electoral scheme was] 'conceived or operated [as a] purposeful devic[e] to further racial . . . discrimination.'" *Id.*, at 70 (emphasis added), quoting *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (1971). Because I believe that *Mobile* controls this case, I dissent.

II

The Court's decision today relies heavily on the capacity of the federal district courts—essentially free from any standards propounded by this Court—to determine whether at-large voting systems are "being maintained for the invidious purpose of diluting the voting strength of the black population." *Ante*, at 622. Federal courts thus are invited to engage in deeply subjective inquiries into the motivations of local officials in structuring local governments. Inquiries of this kind not only can be "unseemly," see Karst, The Costs of Motive-Centered Inquiry, 15 San Diego L. Rev. 1163, 1164 (1978); they intrude the federal courts—with only the vaguest constitutional direction—into an area of intensely local and political concern.

Emphasizing these considerations, JUSTICE STEVENS, *post*, at 642–650, argues forcefully that the Court's focus of inquiry is seriously mistaken. I agree with much of what he says. As I do not share his views entirely, however, I write separately.

A

As I understand it, JUSTICE STEVENS' critique of the Court's approach rests on three principles with which I am in fundamental agreement.

First, it is appropriate to distinguish between "state action that inhibits an individual's right to vote and state action that affects the political strength of various groups." *Mobile* v. *Bolden*, *supra*, at 83 (STEVENS, J., concurring in judgment); see *post*, at 632, 637–638, n. 16. Under this distinction, this case is fundamentally different from cases involving direct barriers to voting. There is no claim here that blacks may not register freely and vote for whom they choose. This case also differs from one-man, one-vote cases, in which districting practices make a person's vote less weighty in some districts than in others.

Second, I agree with JUSTICE STEVENS that vote dilution cases of this kind are difficult if not impossible to distinguish—especially in their remedial aspect—from other actions to redress gerrymanders. See *post*, at 650–653.

Finally, JUSTICE STEVENS clearly is correct in arguing that the standard used to identify unlawful racial discrimination in this area should be defined in terms that are judicially manageable and reviewable. See *post*, at 633, 642–650. In the absence of compelling reasons of both law and fact, the federal judiciary is unwarranted in undertaking to restructure state political systems. This is inherently a political area, where the identification of a seeming violation does not necessarily suggest an enforceable judicial remedy—or at least none short of a system of quotas or group representation. Any such system, of course, would be antithetical to the principles of our democracy.

B

JUSTICE STEVENS would accommodate these principles by holding that subjective intent is irrelevant to the establishment of a case of racial vote dilution under the Fourteenth Amendment. See *post*, at 637. Despite sharing the concerns from which his position is developed, I would not accept this view. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). Because I am unwilling to abandon this central principle in cases of this kind, I cannot join JUSTICE STEVENS' opinion.

Nonetheless, I do agree with him that what he calls "objective" factors should be the focus of inquiry in vote-dilution cases. Unlike the considerations on which the lower courts relied in this case and in *Mobile*, the factors identified by JUSTICE STEVENS as "objective" in fact are direct, reliable, and unambiguous indices of discriminatory *intent*. If we held, as I think we should, that the district courts must place primary reliance on these factors to establish discriminatory intent, we would prevent federal-court inquiries into the *subjective* thought processes of local officials—at least until enough objective evidence had been presented to warrant discovery into subjective motivations in this complex, politically charged area. By prescribing such a rule we would hold federal courts to a standard that was judicially manageable. And we would remain faithful to the central protective purpose of the Equal Protection Clause.

In the absence of proof of discrimination by reliance on the kind of objective factors identified by JUSTICE STEVENS, I would hold that the factors cited by the Court of Appeals are too attenuated as a matter of law to support an inference of discriminatory intent. I would reverse its judgment on that basis.

JUSTICE STEVENS, dissenting.

Our legacy of racial discrimination has left its scars on Burke County, Georgia.[1] The record in this case amply supports the conclusion that the governing officials of Burke County have repeatedly denied black citizens rights guaranteed by the Fourteenth and Fifteenth Amendments to the Federal Constitution. No one could legitimately question the validity of remedial measures, whether legislative or judicial, designed to prohibit discriminatory conduct by public officials and to guarantee that black citizens are effectively afforded the rights to register and to vote. Public roads may not be paved only in areas in which white citizens live;[2] black citizens may not be denied employment opportunities in county government;[3] segregated schools may not be maintained.[4]

---

[1] Certain vestiges of discrimination—although clearly not the most pressing problems facing black citizens today—are a haunting reminder of an all too recent period of our Nation's history. The District Court found

Nor, in my opinion, could there be any doubt about the constitutionality of an amendment to the Voting Rights Act that would require Burke County and other covered jurisdictions to abandon specific kinds of at-large voting schemes that perpetuate the effects of past discrimination. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 324. It might indeed be wise policy to accelerate the transition of minority groups to a position of political power commensurate with their voting strength by amending the Act to prohibit the use of multimember districts in all covered jurisdictions.

The Court's decision today, however, is not based on either its own conception of sound policy or any statutory command. The decision rests entirely on the Court's interpretation of the requirements of the Federal Constitution. Despite my sympathetic appraisal of the Court's laudable goals, I am unable to agree with its approach to the constitutional issue that

---

that a segregated laundromat is operated within a few blocks of the county courthouse; at the courthouse itself, faded paint over restroom doors does not entirely conceal the words "colored" and "white."

[2] See *Dowdell* v. *City of Apopka*, 511 F. Supp. 1375 (MD Fla. 1981).

[3] 42 U. S. C. § 2000e-2.

[4] *Brown* v. *Board of Education*, 347 U. S. 483.

is presented. In my opinion, this case raises questions that encompass more than the immediate plight of disadvantaged black citizens. I believe the Court errs by holding the structure of the local governmental unit unconstitutional without identifying an acceptable, judicially manageable standard for adjudicating cases of this kind.

I

The Court's entry into the business of electoral reapportionment in 1962 was preceded by a lengthy and scholarly debate over the role the judiciary legitimately could play in what Justice Frankfurter described in *Colegrove* v. *Green*, 328 U. S. 549, as a "political thicket."[5] In that case, decided in 1946, the Court declined to entertain a challenge to single-member congressional districts in Illinois that had been created in 1901 and had become grossly unequal by reason of the great growth in urban population.[6] In dissent, Justice Black advocated the use of a statewide, at-large election of representatives; he argued that an at-large election "has an element of virtue that the more convenient method does not have—namely, it does not discriminate against some groups to favor others, it gives all the people an equally effective voice in electing their representatives as is essential under a free government, and it is constitutional." *Id.*, at 574.

---

[5] In his much criticized opinion announcing the judgment of the Court, Justice Frankfurter wrote:

"Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.

. . . . .

"Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on Demand of the executive Authority,' Art. IV, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfilment of this duty cannot be judicially enforced. *Kentucky* v. *Dennison*, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, *Mississippi* v. *Johnson*, 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." 328 U. S., at 553–554, 556.

In 1962, the Court changed course. In another challenge to the constitutionality of a 1901 districting statute, it held that the political question doctrine did not foreclose judicial review. *Baker* v. *Carr*, 369 U. S. 186. That decision represents one of the great landmarks in the history of this Court's jurisprudence.

Two aspects of the Court's opinion in *Baker* v. *Carr* are of special relevance to the case the Court decides today. First, the Court's scholarly review of the political question doctrine focused on the dominant importance of satisfactory standards for judicial determination.[7] Second, the Court's articulation of the relevant constitutional standard made no reference to subjective intent.[8] The host of cases that have arisen in the wake of *Baker* v. *Carr* have shared these two characteristics. They have formulated, refined, and applied a judicially manageable standard that has become known as the one-person, one-vote rule; they have attached no significance to the subjective intent of the decisionmakers who adopted or maintained the official rule under attack.

---

[6] The districts ranged in population from 112,000 to 914,000 persons. *Id.*, at 557.

[7] The Court stated that the "nonjusticiability of a political question is primarily a function of the separation of powers." 369 U. S., at 210. It emphasized, however, that "the lack of satisfactory criteria for a judicial determination" was a dominant consideration in *Coleman* v. *Miller*, 307 U. S. 433, 454–455; that whether a foreign relations question is justiciable turns, in part, on "its susceptibility to judicial handling"; that in the presence of clearly definable criteria for decision "the political question barrier falls away"; and that "even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments' determination of dates of hostilities' beginning and ending." 369 U. S., at 210, 211, 214. *Luther* v. *Borden*, 7 How. 1, was distinguished, in part, because that case involved "the lack of criteria by which a court could determine which form of government was republican"; the Court stated that "the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize in-

In reviewing the constitutionality of the structure of a local government, two quite different methods of analysis could be employed. The Court might identify the specific features of the government that raise constitutional concerns and decide whether, singly or in combination, they are valid. This is the approach the Court has used in testing the constitutionality of rules conditioning the right to vote on payment of a poll tax,[9] imposing burdens on independent candidates,[10] denying

---

dependently in order to identify a State's lawful government." 369 U. S., at 222, 223. In concluding that the reapportionment question before it was justiciable, the Court emphasized that it would not be necessary "to enter upon policy determinations for which judicially manageable standards are lacking." *Id.*, at 226.

[8] The Court simply stated:

"Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Ibid.*

[9] *Harper* v. *Virginia Board of Elections*, 383 U. S. 663. The Court concluded that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Id.*, at 666. "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.*, at 668. In dissent, Justice Black noted: "It should be pointed out at once that the Court's decision is to no extent based on a finding that the Virginia law as written or as applied is being used as a device or mechanism to deny Negro citizens of Virginia the right to vote on account of their color." *Id.*, at 672.

[10] *Storer* v. *Brown*, 415 U. S. 724. The Court stated that, in determining the constitutionality of eligibility requirements for independent candi-

new residents or members of the Armed Forces the right to vote,[11] prohibiting crossovers in party primaries,[12] requiring political candidates to pay filing fees,[13] and disadvantaging minority parties in Presidential elections.[14] In none of these cases did the validity of the electoral procedure turn on whether the legislators who enacted the rule subjectively intended to discriminate against minority voters. Under the approach employed by the Court in those cases, the objective circumstances that led to a declaration that an election procedure was unconstitutional would invalidate a similar law wherever it might be found.

Alternatively, the Court could employ a subjective approach under which the constitutionality of a challenged procedure depends entirely on federal judges' appraisals of the reasons why particular localities have chosen to govern themselves in a particular way. The Constitution would simply protect a right to have an electoral machinery established and maintained without the influence of impermissible factors. Constitutional challenges to identical procedures in neighboring communities could produce totally different results, for the subjective motivations of the legislators who enacted the procedures—or at least the admissible evidence that might be discovered concerning such motivation—could be quite different.

In deciding the question presented in this case, the Court abruptly rejects the former approach and considers only the latter. It starts from the premise that Burke County's at-

---

dates, the "inevitable question for judgment" is "could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.*, at 742. See *Mandel* v. *Bradley*, 432 U. S. 173, 177; *id.*, at 181 (STEVENS, J., dissenting). See also *American Party of Texas* v. *White*, 415 U. S. 767, 795.

[11] *Dunn* v. *Blumstein*, 405 U. S. 330; *Carrington* v. *Rash*, 380 U. S. 89.

[12] *Kusper* v. *Pontikes*, 414 U. S. 51.

[13] *Lubin* v. *Panish*, 415 U. S. 709; *Bullock* v. *Carter*, 405 U. S. 134.

[14] *Williams* v. *Rhodes*, 393 U. S. 23.

large method of electing its five county commissioners is, on its face, unobjectionable. The otherwise valid system is unconstitutional, however, because it makes it more difficult for the minority to elect commissioners and because the majority that is now in power has maintained the system for that very reason. Two factors are apparently of critical importance: (1) the intent of the majority to maintain control; and (2) the racial character of the minority.[15]

I am troubled by each aspect of the Court's analysis. In my opinion, the question whether Burke County's at-large system may survive scrutiny under a purely objective analysis is not nearly as easy to answer as the Court implies. Assuming, however, that the system is otherwise valid, I do not believe that the subjective intent of the persons who adopted the system in 1911, or the intent of those who have since declined to change it, can determine its constitutionality. Even if the intent of the political majority were the controlling constitutional consideration, I could not agree that the only political groups that are entitled to protection under the Court's rule are those defined by racial characteristics.

II

At-large voting systems generally tend to maximize the political power of the majority. See *ante*, at 616.[16] There are, however, many types of at-large electoral schemes. Three features of Burke County's electoral system are noteworthy, not in my opinion because they shed special light on the subjective intent of certain unidentified people, but rather because they make it especially difficult for a minority candidate to win an election. First, although the qualifications and the duties of the office are identical for all five commissioners, each runs for a separately designated position.[17]

---

[15] The Court's articulation of the applicable standard in this case is somewhat puzzling. It states that this case is subject to "the standard of proof generally applicable to Equal Protection Clause cases." *Ante*, at 617. But later in the same paragraph, the Court indicates that its special requirement of a showing of discriminatory intent merely applies to equal protection cases "charging racial discrimination." *Ibid.* The Court seems to imply that plaintiffs in equal protection cases charging racial discrimination must surmount a special hurdle in order to prevail. Yet the Court has unequivocally stated that a "racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272.

[16] In the words of Chancellor Kent, the requirement of districting "was recommended by the wisdom and justice of giving, as far as possible, to the

---

local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils." 1 J. Kent, Commentaries on American Law *230–*231, n. (c) (12th ed. 1873). See also *Mobile* v. *Bolden*, 446 U. S. 55, 105, n. 3 (MARSHALL, J., dissenting); *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–160.

The challenge to multimember or at-large districts is, of course, quite different from the challenge to the value of individual votes considered in *Reynolds* v. *Sims*, 377 U. S. 533. An at-large system is entirely consistent with the one-person, one-vote rule developed in that case. As Justice Stewart noted in *Mobile*, in considering the applicability of *Reynolds* and the cases that followed it:

> "Those cases established that the Equal Protection Clause guarantees the right of each voter to 'have his vote weighted equally with those of all other citizens.' 377 U. S., at 576. The Court recognized that a voter's right to 'have an equally effective voice' in the election of representatives is impaired where representation is not apportioned substantially on a population basis. In such cases, the votes of persons in more populous districts carry less weight than do those of persons in smaller districts. There can be, of course, no claim that the 'one person, one vote' principle has been violated in this case, because the city of Mobile is a unitary electoral district and the Commission elections are conducted at large. It is therefore obvious that nobody's vote has been 'diluted' in the sense in which that word was used in the *Reynolds* case." 446 U. S., at 77–78 (plurality opinion).

See also *id.*, at 83 (STEVENS, J., concurring in judgment).

[17] This feature distinguishes Burke County's at-large electoral system from the municipal commission form of government popularized by reformers shortly after the turn of the century and known as the Galveston Plan or the Des Moines Plan. See n. 19, *infra*.

Second, in order to be elected, each commissioner must receive a majority of all votes cast in the primary and in the general election; if the leading candidate receives only a plurality, a runoff election must be held. Third, there are no residency requirements; thus, all candidates could reside in a single, all-white neighborhood.[18]

Even if one assumes that a system of local government in which power is concentrated in the hands of a small group of persons elected from the community at large is an acceptable—or perhaps even a preferred—form of municipal government,[19] it is not immediately apparent that these addi-

---

[18] Other features of certain at-large electoral schemes that make it more difficult for a minority group to elect a favored candidate when bloc voting occurs—prohibitions against cumulative and incomplete voting—are not involved in this case. Prohibitions against cumulative or partial voting are generally inapplicable in electoral schemes involving numbered posts.

[19] "During its evolution as a progressive solution to municipal problems, the commission format was variously known as the Galveston plan, the Texas idea, and the Des Moines plan. Since Galveston invented the basic organization and Des Moines popularized the addition of related reform techniques, the new type of government is probably best described as the Galveston—Des Moines plan. So popular did the new idea become that towns could reap advertising benefits for being in the forefront of municipal innovation if they used the commission plan. Consequently, some cities boasted that they had the system, knowing full well that their charters had little resemblance to Galveston's. But there were certain essentials necessary before a city could claim commission status. Benjamin DeWitt, an early historian of the progressive movement, explained:

"'In every case, however, no matter how much charters may differ as to minor details, they have certain fundamental features in common. These fundamental features of commission charters are four:

"1. Authority and responsibility are centralized.

"2. The number of men in whom this authority and this responsibility are vested is small.

"3. These few men are elected from the city at large and not by wards or districts.

"4. Each man is at the head of a single department.'

"The most radical departure the new scheme made was the combination of legislative and executive functions in one body. The plan disregarded the federal model of separation of powers. Sitting together, the commistional features that help to perpetuate the power of an entrenched majority are either desirable or legitimate.[20] If the only purpose these features serve—particularly when viewed in combination—is to assist a dominant party to maintain its political power, they are no more legitimate than the Tennessee districts described in *Baker* v. *Carr* as "*no* policy, but simply arbitrary and capricious action." 369 U. S., at 226 (emphasis in original). Unless these features are independently justified, they may be invalid simply because there is no legitimate justification for their impact on minority participation in elections.[21]

In this case, appellees have not argued—presumably because they assumed that this Court's many references to the requirement of proving an improper motive in equal protection cases are controlling in this new context—that the special features of Burke County's at-large system have such an

---

sion was a typical policy- and ordinance-making council; but, separately, each commissioner administered a specific department on a day-to-day basis. The original Galveston charter provided for a mayor-president plus commissioners of finance and revenue, waterworks and sewerage, streets and public property, and fire and police. Later commission cities followed a similar division of responsibility." B. Rice, Progressive Cities: The Commission Government Movement in America, 1901–1920, pp. xiii–xiv (1977) (footnote omitted).

[20] It is noteworthy that these features apparently characterize many governmental units in jurisdictions that have been subjected to the strictures of the Voting Rights Act as the result of prior practices that excluded black citizens from the electoral process. See generally The Voting Rights Act: Unfulfilled Goals, A Report of the United States Commission on Civil Rights 38–50 (1981).

[21] No group has a right to proportional representation. See *Mobile* v. *Bolden*, 446 U. S., at 75–76 (plurality opinion); *id.*, at 122 (MARSHALL, J., dissenting). But in a representative democracy, meaningful participation by minority groups in the electoral process is essential to ensure that representative bodies are responsive to the entire electorate. For this reason, a challenged electoral procedure may not be justified solely on the ground that it serves to reduce the ability of a minority group to participate effectively in the electoral process.

adverse impact on the minority's opportunity to participate in the political process that this type of government deprives the minority of equal protection of the law. Nor have the appellants sought to identify legitimate local policies that might justify the use of such rules. As a result, this record does not provide an adequate basis for determining the validity of Burke County's governmental structure on the basis of traditional objective standards.[22]

If the governmental structure were itself found to lack a legitimate justification, inquiry into subjective intent would clearly be unnecessary. As JUSTICE MARSHALL stated in his dissent in *Mobile:* "Whatever may be the merits of applying motivational analysis to the allocation of constitutionally gratuitous benefits, that approach is completely misplaced where, as here, it is applied to the distribution of a constitutionally protected interest." 446 U. S., at 121.[23] Under the

---

[22] The record nevertheless does indicate that the validity of the at-large system itself need not be decided in this case. For it is apparent that elimination of the majority runoff requirement and the numbered posts would enable a well-organized minority to elect one or two candidates to the County Board. That consequence could be achieved without replacing the at-large system itself with five single-member districts. In other words, minority access to the political process could be effected by invalidating specific rules that impede that access and without changing the basic structure of the local governmental unit. See *Mobile* v. *Bolden*, *supra*, at 80 (BLACKMUN, J., concurring in result).

[23] It is worth repeating the statement of Professor Ely noted by JUSTICE MARSHALL:

"The danger I see is the somewhat different one that the Court, in its new-found enthusiasm for motivation analysis, will seek to export it to fields where it has no business. It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). In such cases the covert employment of a principle of selection that could not constitutionally be employed overtly is equally unconstitutional. However, *where what is denied is something to which*

Court's analysis, however, the characteristics of the particular form of government under attack are virtually irrelevant. Not only would the Court's approach uphold an arbitrary—but not invidious—system that lacked independent justification, it would invalidate—if a discriminatory intent were proved—a local rule that would be perfectly acceptable absent a showing of invidious intent. The Court's standard applies not only to Burke County and to multimember districts, but to any other form of government as well.

III

Ever since I joined the Court, I have been concerned about the Court's emphasis on subjective intent as a criterion for constitutional adjudication.[24] Although that criterion is often

---

the complainant has a substantive constitutional right—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—*the reasons it was denied are irrelevant.* It may become important in court what justifications counsel for the state can *articulate* in support of its denial or non-provision, but the reasons that actually inspired the denial never can: To have a right to something is to have a claim on it irrespective of why it is denied. It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional." Ely, The Centrality and Limits of Motivation Analysis, 15 San Diego L. Rev. 1155, 1160–1161 (1978) (emphasis in original) (footnotes omitted).

[24] In *Washington* v. *Davis*, 426 U. S. 229, I wrote:

"Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it." *Id.*, at 253 (concurring opinion).

regarded as a restraint on the exercise of judicial power, it may in fact provide judges with a tool for exercising power that otherwise would be confined to the legislature.[25] My principal concern with the subjective-intent standard, however, is unrelated to the quantum of power it confers upon the judiciary. It is based on the quality of that power. For in the long run constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause of the Fourteenth Amendment.

The facts of this case illustrate the ephemeral character of a constitutional standard that focuses on subjective intent. When the suit was filed in 1976, approximately 58 percent of the population of Burke County was black and approximately 42 percent was white. Because black citizens had been denied access to the political process—through means that have since been outlawed by the Voting Rights Act of 1965—and because there had been insufficient time to enable the registration of black voters to overcome the history of past injustice, the majority of registered voters in the county were white. The at-large electoral system therefore served, as a result of the presence of bloc voting, to maintain white control of the local government. Whether it would have continued to do so would have depended on a mix of at least three different factors—the continuing increase in voter registration among blacks, the continuing exodus of black residents from the county, and the extent to which racial bloc voting continued to dominate local politics.

If those elected officials in control of the political machinery had formed the judgment that these factors created a likelihood that a bloc of black voters was about to achieve sufficient strength to elect an entirely new administration, they might have decided to abandon the at-large system and substitute five single-member districts with the boundary lines drawn to provide a white majority in three districts and a black majority in only two. Under the Court's intent standard, such a change presumably would violate the Fourteenth Amendment. It is ironic that the remedy ordered by the District Court fits that pattern precisely.[26]

---

[25] See Miller, If "The Devil Himself Knows Not the Mind of Man," How Possibly Can Judges Know the Motivation of Legislators?, 15 San Diego L. Rev. 1167, 1170 (1978).

If votes continue to be cast on a racial basis, the judicial remedy virtually guarantees that whites will continue to control a majority of seats on the County Board. It is at least possible that white control of the political machinery has been frozen by judicial decree at a time when increased black voter registration might have led to a complete change of administration. Since the federal judge's intent was unquestionably benign rather than invidious—and, unlike that of state officials, is presumably not subject in any event to the Court's standard—that result has been accomplished without violating the Federal Constitution.

In the future, it is not inconceivable that the white officials who are likely to remain in power under the District Court's plan will desire to perpetuate that system and to continue to control a majority of seats on the County Board. Under this Court's standard, if some of those officials harbor such an intent for an "invidious" reason, the District Court's plan will itself become unconstitutional. It is not clear whether the invidious intent would have to be shared by all three white

---

[26] The following table shows a breakdown of the population of the districts in the plan selected by the District Court as to race and voting age:

District	Voting Age Population	Black Voting Age Population (%)	White Voting Age Population (%)
1	2,048	1,482 (72.4)	556 (27.6)
2	2,029	1,407 (69.3)	622 (30.7)
3	2,115	978 (46.2)	1,137 (53.8)
4	2,112	947 (44.6)	1,175 (55.4)
5	2,217	803 (36.2)	1,414 (63.8)

See *Lodge* v. *Buxton*, 639 F. 2d 1358, 1361, n. 4 (CA5 1981).

commissioners, by merely a majority of two, or by simply one if he were influential. It is not clear whether the issue would be affected by the intent of the two black commissioners, who might fear that a return to an at-large system would undermine the certainty of two black seats.[27] Of course, if the subjective intent of these officials were such as to mandate a change to a governmental structure that would permit black voters to elect an all-black commission—and if black voters did so—those black officials could not harbor an intent to maintain the system to keep whites from returning to power. In sum, as long as racial consciousness exists in Burke County, its governmental structure is subject to attack. Perhaps those more familiar than I with political maneuvering will be able to identify with greater accuracy and reliability those subjective intentions that are legitimate and those that are not. Because judges may not possess such expertise, however, I am afraid the Court is planting seeds that may produce an unexpected harvest.

The costs and the doubts associated with litigating questions of motive, which are often significant in routine trials, will be especially so in cases involving the "motives" of legislative bodies.[28] Often there will be no evidence that the gov-

---

[27] In *Wright* v. *Rockefeller*, 376 U. S. 52, a group of minority voters in New York City challenged a districting scheme that placed most minority voters in one of four districts. They sought "a more even distribution of minority groups among the four congressional districts." *Id.*, at 58. Congressman Adam Clayton Powell intervened in the lawsuit and argued strenuously "that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional." *Ibid.*

[28] Professor Karst has strongly criticized motivational analysis on the ground that it is inadequate to protect black citizens from unconstitutional conduct:

> "[E]ven though the proof will center on the effects of what officials have done, the ultimate issue will be posed in terms of the goodness or the evil of the officials' hearts. Courts have long regarded such inquiries as unseemly, as the legislative investigation cases of the 1950's attest. The

ernmental system was *adopted* for a discriminatory reason.[29] The reform movement in municipal government, see n. 19, *supra*, or an attempt to comply with the strictures of *Reynolds* v. *Sims*, 377 U. S. 533, may account for the enactment of

---

principal concern here is not that tender judicial sensitivities may be bruised, but that a judge's reluctance to challenge the purity of other officials' motives may cause her to fail to recognize valid claims of racial discrimination even when the motives for governmental action are highly suspect. Because an individual's behavior results from the interaction of a multitude of motives, and because racial attitudes often operate at the margin of consciousness, in any given case there almost certainly will be an opportunity for a governmental official to argue that his action was prompted by racially neutral considerations. When that argument is made, should we not expect the judge to give the official the benefit of the moral doubt? When the governmental action is the product of a group decision, will not that tendency toward generosity be heightened?" Karst, The Costs of Motive-Centered Inquiry, 15 San Diego L. Rev. 1163, 1164–1165 (1978) (footnote omitted).

To reject an examination into subjective intent is not to rule that the *reasons* for legislative action are irrelevant. "In my opinion, customary indicia of legislative intent provide an adequate basis for ascertaining the purpose that a law is intended to achieve. The formal proceedings of the legislature and its committees, the effect of the measure as evidenced by its text, the historical setting in which it was enacted, and the public acts and deeds of its sponsors and opponents, provide appropriate evidence of legislative purpose." *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 856 (CA7 1972) (Stevens, J., dissenting), cert. denied, 409 U. S. 893. If a challenged law disadvantages minority citizens and its justifications—as evidenced by customary indicia of legislative intent—are insufficient to persuade a neutral observer that the law was enacted for legitimate, nondiscriminatory reasons, it is, in my opinion, invalid.

[29] As the Court of Appeals noted: "The general election laws in many jurisdictions were originally adopted at a time when Blacks had not receive[d] their franchise. No one disputes that such laws were not adopted to achieve an end, the exclusion of Black voting, that was the status quo. Other states' election laws, though adopted shortly after the enactment of the Fifteenth Amendment, are so old that whatever evidence of discriminatory intent may have existed, has long since disappeared. This case falls within that category. The focus then becomes the existence of a discriminatory purpose for the *maintenance* of such a system." 639 F. 2d, at 1363, n. 7.

countless at-large systems. In such a case the question becomes whether the system was *maintained* for a discriminatory purpose. Whose intentions control? Obviously not the voters, although they may be most responsible for the attitudes and actions of local government.[30] Assuming that it is the intentions of the "state actors" that is critical, how will their mental processes be discovered? Must a specific proposal for change be defeated? What if different motives are held by different legislators or, indeed, by a single official? Is a selfish desire to stay in office sufficient to justify a failure to change a governmental system?

The Court avoids these problems by failing to answer the very question that its standard asks. Presumably, according to the Court's analysis, the Burke County governmental structure is unconstitutional because it was maintained at some point for an invidious purpose. Yet the Court scarcely identifies the manner in which changes to a county governmental structure are made. There is no reference to any unsuccessful attempt to replace the at-large system with single-member districts. It is incongruous that subjective intent is identified as the constitutional standard and yet the persons who allegedly harbored an improper intent are never identified or mentioned. Undoubtedly, the evidence relied on by the Court proves that racial prejudice has played an important role in the history of Burke County and has motivated many wrongful acts by various community leaders. But unless that evidence is sufficient to prove that *every* governmental action was motivated by a racial animus—and may be remedied by a federal court—the Court has failed under its own test to demonstrate that the governmental structure of Burke County was maintained for a discriminatory purpose.

Certainly governmental action should not be influenced by irrelevant considerations. I am not convinced, however, that the Constitution affords a right—and this is the *only* right the Court finds applicable in this case—to have every official decision made without the influence of considerations that are in some way "discriminatory." Is the failure of a state legislature to ratify the Equal Rights Amendment invalid if a federal judge concludes that a majority of the legislators harbored stereotypical views of the proper role of women in society? Is the establishment of a memorial for Jews slaughtered in World War II unconstitutional if civic leaders believe that their cause is more meritorious than that of victimized Palestinian refugees? Is the failure to adopt a state holiday for Martin Luther King, Jr., invalid if it is proved that state legislators believed that he does not deserve to be commemorated? Is the refusal to provide Medicaid funding for abortions unconstitutional if officials intend to discriminate against women who would abort a fetus?[31]

---

[30] Apart from the lack of "state action," the very purpose of the secret ballot is to protect the individual's right to cast a vote without explaining to anyone for whom, or for what reason, the vote is cast.

A rule that would invalidate all governmental action motivated by racial, ethnic, or political considerations is too broad. Moreover, in my opinion the Court is incorrect in assuming that the intent of elected officials is invidious when they are motivated by a desire to retain control of the local political machinery. For such an intent is surely characteristic of politicians throughout the country. In implementing that sort of purpose, dominant majorities have used a wide variety of techniques to limit the political strength of aggressive minorities. In this case the minority is defined by racial characteristics, but minority groups seeking an effective political voice can, of course, be identified in many other ways. The Hasidic Jews in Kings County, N. Y.,[32] the Puerto Ricans in Chicago,[33] the Spanish-speaking citizens in Dallas,[34] the Bohemians in Cedar Rapids,[35] the Federalists in Massachusetts,[36] the Democrats in Indiana,[37] and the Republicans in California[38] have all been disadvantaged by deliberate political maneuvers by the dominant majority. As I have stated, a device that serves no purpose other than to exclude minority groups from effective political participation is unlawful under objective standards. But if a political majority's intent to maintain control of a legitimate local government is sufficient to invalidate any electoral device that makes it more difficult for a minority group to elect candidates—regardless of the nature of the interest that gives the minority group cohesion—the Court is not just entering a "political thicket"; it is entering a vast wonderland of judicial review of political activity.

---

[31] A stereotypical reaction to particular characteristics of a disfavored group cannot justify discriminatory legislation. See, *e. g.*, *Mathews* v. *Lucas*, 427 U. S. 495, 520–521 (STEVENS, J., dissenting). It is nevertheless important to remember that the First Amendment protects an individual's right to entertain unsound and unpopular beliefs—including stereotypical beliefs about classes of persons—and to expound those beliefs publicly. There is a vast difference between rejecting an irrational belief as a justification for discriminatory legislation and concluding that neutral legislation is invalid because it was motivated by an irrational belief. Fresh air and open discussion are better cures for vicious prejudice than are secrecy and dissembling. No matter how firmly I might disagree with a legislator's motivation in casting a biased vote, I not only must respect his right to form his own opinions, cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 63 (opinion of STEVENS, J.), but also would prefer a candid explanation of those opinions to a litigation-oriented silence.

The obvious response to this suggestion is that this case involves a racial group and that governmental decisions that disadvantage such a group must be subject to special scrutiny under the Fourteenth Amendment. I therefore must consider whether the Court's holding can legitimately be confined to political groups that are identified by racial characteristics.

---

[32] See *United Jewish Organization* v. *Carey*, 430 U. S. 144.

[33] See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830 (CA7 1972), cert. denied, 409 U. S. 893.

[34] See *White* v. *Regester*, 412 U. S. 755.

[35] See Rice, *supra* n. 19, at 78.

[36] The term "gerrymander" arose from an election district—that took the shape of a salamander—formed in Massachusetts by Governor Elbridge Gerry's Jeffersonian or Democratic-Republican Party. The phrase was coined by Gerry's opponents, the Federalists.

[37] See 39 Congressional Quarterly 758 (1981).

[38] See *id.*, at 941.

IV

Governmental action that discriminates between individuals on the basis of their race is, at the very least, presumptively irrational.[39] For an individual's race is virtually always irrelevant to his right to enjoy the benefits and to share the responsibilities of citizenship in a democratic society. Persons of different races, like persons of different religious faiths and different political beliefs, are equal in the eyes of the law.

Groups of every character may associate together to achieve legitimate common goals. If they voluntarily identify themselves by a common interest in a specific issue, by a common ethnic heritage, by a common religious belief, or by their race, that characteristic assumes significance as the bond that gives the group cohesion and political strength. When referring to different kinds of political groups, this Court has consistently indicated that, to borrow JUSTICE BRENNAN's phrasing, the Equal Protection Clause does not make some groups of citizens more equal than others. See *Zobel* v. *Williams*, 457 U. S. 55, 71 (BRENNAN, J., concurring). Thus, the Court has considered challenges to discrimination based on "differences of color, race, nativity, religious opinions [or] political affiliations," *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92; to redistricting plans that serve "to further racial or economic discrimination," *Whitcomb* v. *Chavis*, 403 U. S. 124, 149; to biases "tending to favor particular political interests or geographic areas." *Abate* v. *Mundt*, 403 U. S. 182, 187. Indeed, in its opinion today the Court recognizes that the practical impact of the electoral system at issue applies equally to any "distinct minority, whether it be a racial, ethnic, economic, or political group." *Ante*, at 616.

---

[39] Since I do not understand the Court's opinion to rely on an affirmative-action rationale, I put that entire subject to one side. If that were the rationale for the Court's holding, however, there would be no need to inquire into subjective intent.

A constitutional standard that gave special protection to political groups identified by racial characteristics would be inconsistent with the basic tenet of the Equal Protection Clause. Those groups are no more or no less able to pursue their interests in the political arena than are groups defined by other characteristics. Nor can it be said that racial alliances are so unrelated to political action that any electoral decision that is influenced by racial consciousness—as opposed to other forms of political consciousness—is inherently irrational. For it is the very political power of a racial or ethnic group that creates a danger that an entrenched majority will take action contrary to the group's political interests. "The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. Thus the characteristic of the group which creates the need for protection is its political character." *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 852 (CA7 1972) (Stevens, J., dissenting), cert. denied, 409 U. S. 893. It would be unrealistic to distinguish racial groups from other political groups on the ground that race is an irrelevant factor in the political process.

Racial consciousness and racial association are not desirable features of our political system. We all look forward to the day when race *is* an irrelevant factor in the political process. In my opinion, however, that goal will best be achieved by eliminating the vestiges of discrimination that motivate disadvantaged racial and ethnic groups to vote as identifiable units. Whenever identifiable groups in our society are disadvantaged, they will share common political interests and tend to vote as a "bloc." In this respect, racial groups are like other political groups. A permanent constitutional rule that treated them differently would, in my opinion, itself tend to perpetuate race as a feature distinct from all others; a trait that makes persons different in the eyes of the law. Such a rule would delay—rather than advance—the goal advocated by Justice Douglas:

> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." *Wright* v. *Rockefeller*, 376 U. S. 52, 67 (dissenting opinion).

My conviction that all minority groups are equally entitled to constitutional protection against the misuse of the majority's political power does not mean that I would abandon judicial review of such action. As I have written before, a gerrymander as grotesque as the boundaries condemned in *Gomillion* v. *Lightfoot*, 364 U. S. 339, is intolerable whether it fences out black voters, Republican voters, or Irish-Catholic voters. *Mobile* v. *Bolden*, 446 U. S., at 86 (opinion concurring in judgment). But if the standard the Court applies today extends to all types of minority groups, it is either so broad that virtually every political device is vulnerable or it is so undefined that federal judges can pick and choose almost at will among those that will be upheld and those that will be condemned.

There are valid reasons for concluding that certain minority groups—such as the black voters in Burke County, Georgia—should be given special protection from political oppression by the dominant majority. But those are reasons that justify the application of a legislative policy choice rather than a constitutional principle that cannot be confined to special circumstances or to a temporary period in our history. Any suggestion that political groups in which black leadership predominates are in need of a permanent constitutional shield against the tactics of their political opponents underestimates the resourcefulness, the wisdom, and the demonstrated capacity of such leaders. I cannot accept the Court's constitutional holding.[40]

I respectfully dissent.

---

[40] The Court does not address the statutory question whether the at-large system violates § 2 of the Voting Rights Act of 1965. Neither the District Court nor the Court of Appeals considered this issue. Since appellees have been granted full relief by the Court, I express no opinion on their statutory claims.

RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA *v.* NORMAN WILLIAMS CO. ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

No. 80-1012. Argued April 21, 1982—Decided July 1, 1982*

A provision of California's alcoholic beverage laws states that a "licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent" (designation statute). The statute apparently was enacted in response to the perceived extraterritorial effects of Oklahoma's "open wholesaling" statutes, whereby a licensed California importer who was unable to obtain distilled spirits through the distiller's established distribution system could obtain them from Oklahoma wholesalers. Prior to the designation statute's effective date, respondents sought an extraordinary writ from the California Court of Appeal to enjoin the enforcement of the statute. The court entered judgment for respondents, holding that the conduct contemplated by the statute was *per se* illegal under § 1 of the Sherman Act because it gave distillers the unfettered power to restrain competition by merely deciding who may or may not compete in handling the distillers' brands, and that thus the statute on its face was invalid pursuant to the Supremacy Clause of the Federal Constitution.

Held:

1. California's designation statute is not invalid on its face as being pre-empted by the Sherman Act. Pp. 659–662.

(a) A state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of those laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed

---

*Together with No. 80-1030, *Bohemian Distributing Co.* v. *Norman Williams Co. et al.;* and No. 80-1052, *Wine & Spirits Wholesalers of California* v. *Norman Williams Co. et al.*, also on certiorari to the same court.

under the rule of reason, the statute cannot be condemned in the abstract. Pp. 659–661.

(b) A distiller's invocation of California's statute would not be subject in all cases to a *per se* rule of illegality under the Sherman Act. A manufacturer's use of vertical nonprice restraints is not *per se* illegal. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36. California's designation statute merely enforces the distiller's decision to restrain intrabrand competition, preventing an unauthorized wholesaler from obtaining the distiller's products from outside the distiller's established distribution chain. The effect of the statute is simply to counteract the perceived extraterritorial effects of Oklahoma's alcoholic beverage laws, thus restoring the distiller's ability to determine which wholesalers may import its products into California. While the manner in which a distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be subject to Sherman Act analysis under the rule of reason, there is no basis for condemning the statute itself by force of the Sherman Act. Pp. 661–662.

2. The California statute is not pre-empted by § 5(a) of the Federal Alcohol Administration Act, which prohibits a distiller or wholesaler from establishing exclusive *retail* outlets. California's statute in no way requires exclusive retail outlets, and by its terms does not even require exclusive wholesale arrangements. Pp. 663–664.

3. The designation statute does not deny respondents due process of law. Respondents do not possess any constitutionally protected liberty or property interest in obtaining the distiller's permission to deal in its products, and thus the Due Process Clause is not offended by the wholesaler's inability to challenge the distiller's decisionmaking. P. 664.

4. Nor does the designation statute violate the Equal Protection Clause because it discriminates between designated and nondesignated wholesalers. The statute is rationally related to its legitimate purposes, enabling the distiller to place restraints on intrabrand competition in order to foster interbrand competition. P. 665.

108 Cal. App. 3d 348, 166 Cal. Rptr. 563, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which WHITE, J., joined, *post*, p. 665.

John R. McDonough argued the cause for petitioners in Nos. 80–1030 and 80–1052. With him on the briefs for petitioner in No. 80–1052 were *Joseph A. Ball*, *Michael J.*

Maloney, *James Polish*, and *William T. Chidlaw*. *Frank Rothman*, *Christina A. Snyder*, *George Miron*, and *Frank H. Easterbrook* filed briefs for petitioner in No. 80–1030.

George J. Roth, Deputy Attorney General of California, argued the cause for petitioner in No. 80–1012. With him on the brief was *George Deukmejian*, Attorney General.

George G. Weickhardt argued the cause for respondents. With him on the brief was *Leland R. Selna, Jr.*†

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents in these cases obtained from the California Court of Appeal an extraordinary writ prohibiting the California Department of Alcoholic Beverage Control from enforcing an amendment to the State's liquor statutes. That court held that because the conduct contemplated by the amendment was *per se* illegal under the Sherman Act, the statute on its face was invalid pursuant to the Supremacy Clause of the United States Constitution. 108 Cal. App. 3d 348, 166 Cal. Rptr. 563 (1980). We conclude that the California Court of Appeal was mistaken in its application of antitrust and pre-emption principles, and we reverse its judgment.

I

Alcoholic beverages may be brought into California from outside the State for delivery or use within the State *only* if the beverages are consigned to a licensed importer. Cal. Bus. & Prof. Code Ann. § 23661 (West Supp. 1982). In 1979, the California Legislature amended the State's alcoholic beverage control laws to provide that a "licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." § 23672. This challenged statute, which was to become effective on January 1, 1980, is understandably referred to as a "designation statute."[1]

---

†Briefs of *amici curiae* urging reversal were filed by *Noble K. Gregory* and *Parker A. Maddux* for the Distilled Spirits Council of the United States, Inc.; by *Ralph J. Savarese* for Heublein, Inc.; and by *Macdonald Flinn*, *Douglas W. Metz*, and *Abraham Tunick* for the Wine and Spirits Wholesalers of America, Inc., et al.

Harry M. Snyder filed a brief for the Consumers Union of United States, Inc., as *amicus curiae* urging affirmance.

California apparently enacted its designation statute in response to the effects of Oklahoma's alcoholic beverage laws. At the time, Oklahoma's statutes were understood to require any distiller or brand owner selling its products to Oklahoma wholesalers to sell to *all* wholesalers on a nondiscriminatory basis.[2] Because of the perceived extraterritorial effect of Oklahoma's "open-wholesaling" statutes, a licensed California importer who was unable to obtain distilled spirits through the distiller's established distribution system could obtain them from Oklahoma wholesalers. As a result, a distiller who desired to sell its products to Oklahoma wholesalers was unable to rely on contractual undertakings to determine which California wholesalers would handle its products. California's designation statute, therefore, sought to close off the "Oklahoma connection" to California importers not authorized by the distiller to deal in its products.[3]

---

[1] Section 23672 is actually an amended version of a statute invalidated by the California Supreme Court in *Rice* v. *Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P. 2d 476 (1978), because its minimum price system constituted resale price maintenance in violation of the Sherman Act. See *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 100–102 (1980).

[2] Okla. Stat., Tit. 37, § 533 (1981).

[3] The Oklahoma Supreme Court, however, has recently closed off the "Oklahoma connection" by holding that the open-wholesaling statute does not apply to alcoholic beverages destined for consumption in other States. *Central Liquor Co.* v. *Oklahoma Alcoholic Beverage Control Bd.*, 640 P. 2d 1351 (1982). What made the "Oklahoma connection" particularly attractive to California wholesalers was that Oklahoma required distillers to sell to Oklahoma wholesalers at the lowest price charged for its products anywhere in the United States. See Okla. Stat., Tit. 37, § 536.1 (1981). The demise of the "Oklahoma connection," however, has no bearing on our disposition of the legal issues in these cases.

Prior to the effective date of the designation statute, respondents, liquor importers who were benefiting from the "Oklahoma connection," sought an extraordinary writ from the California Court of Appeal enjoining the enforcement of the designation statute. The Court of Appeal agreed with respondents that the designation statute on its face conflicted with § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1.[4] According to that court, the designation statute would result, in all cases, in a *per se* violation of the Sherman Act, because it "gives brand owners the unfettered power to restrain competition . . . by merely deciding who may and who may not compete." 108 Cal. App. 3d, at 356, 166 Cal. Rptr., at 569. The Court of Appeal distinguished *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), in which we held that vertical nonprice restraints are to be judged under the "rule of reason" rather than under a *per se* rule of illegality, on the ground that respondents did not attack the distiller's decision to refuse to do business with them, but "the state provided authority of the distillers to prohibit them from trading with others." 108 Cal. App. 3d, at 357, 166 Cal. Rptr., at 570.

The Supreme Court of California denied review. We granted certiorari, 454 U. S. 1080 (1981), and now reverse.

---

[4] Although it did not phrase its conclusion in these terms, it is evident that the California Court of Appeal concluded that the designation statute was pre-empted by the Sherman Act. The court properly recognized that it had no jurisdiction to entertain a lawsuit brought pursuant to § 4 of the Clayton Act, 15 U. S. C. § 15. 108 Cal. App. 3d 348, 354, n. 2, 166 Cal. Rptr. 563, 568, n. 2 (1980). Rather than seeking a private remedy against private parties, respondents in these cases sought to enjoin the enforcement of a state statute that they contend to be unconstitutional under the Supremacy Clause in its every application. Indeed, because respondents brought this suit prior to the effective date of the statute, respondents did not, and could not, challenge any vertical restraints actually employed by a distiller pursuant to the statute. Instead, respondents challenge the statute on its face without consideration of particular circumstances.

II

A

In determining whether the Sherman Act pre-empts a state statute, we apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause. As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect. See, *e. g.*, *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 110–111 (1978); *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 129–134 (1978); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 45–46 (1966).

A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. In *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), we examined a statute that *required* members of the California wine industry to file fair trade contracts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer's brands. We held that the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation[5] of the Sherman Act. *Id.*, at 102–103; see *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 407–409 (1911).

---

[5] Under established antitrust principles, *per se* rules of illegality are appropriate only when they apply to practices "'which because of their perni-

By contrast, in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter, supra*, we rejected a facial attack upon § 9 of New York's Alcoholic Beverage Control Law,[6] which required retailers and wholesalers to file monthly price schedules with the State Liquor Authority accompanied by an affirmation that the prices charged were no higher than the lowest price at which sales were made anywhere in the United States during the preceding month. *Id.*, at 39–40. The Court found no clear repugnancy between § 9 and the federal antitrust laws:

> "The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. Section 9 imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country. . . .
>
> "Although it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patman Act might be compelled by § 9, the existence of such potential conflicts is entirely too specula-

---

cious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50 (1977), quoting *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958). It is not surprising, therefore, that a statute which requires practices *per se* illegal under the Sherman Act may be subject to a facial challenge under the Supremacy Clause.

[6] As with the instant case, because the challenged statute had not as yet been put into effect, this Court in *Hostetter* was presented only with a facial challenge to its constitutionality.

> tive in the present posture of this case . . . ." *Id.*, at 45–46 (citations omitted).

Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

It remains for us to determine whether a distiller's invocation of the designation statute would be subject in all cases to a *per se* rule of illegality under the Sherman Act.

B

We held in *GTE Sylvania* that a manufacturer's use of vertical nonprice restraints is not *per se* illegal. Because restraints on intrabrand competition may promote interbrand competition, we concluded that nonprice vertical restraints should be scrutinized under the rule of reason. 433 U. S., at 57–59. After our decision in *GTE Sylvania*, it cannot be said that every attempt by a manufacturer to restrain competition in its own products is illegal under the Sherman Act.

California's designation statute merely enforces the distiller's decision to restrain intrabrand competition. It permits the distiller to designate which wholesalers may import the distiller's products into the State. It prevents an unauthorized wholesaler from obtaining the distiller's products from outside the distiller's established distribution chain.

The designation statute does not *require* the distiller to impose vertical restraints of any kind; that is a matter for it to determine. The *number* of importers which may be designated by the distiller is not limited; the designated importer is not required to sell the imported brand to retailers within a specified area or from a specified location within the State.

It is irrelevant for our purposes that the distiller's ability to restrict intrabrand competition in California has the imprimatur of a state statute. *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S., at 110–111.[7] The effect of the statute is simply to counteract the perceived extraterritorial effects of Oklahoma's alcoholic beverage laws, which, as once understood, operated to deprive the distiller of control over its distribution system nationwide. Thus, California's designation statute merely restored what Oklahoma had taken away: the distiller's ability to determine which wholesalers may import its products into California.

In these respects, therefore, we find these cases to be much like *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966). As in *Hostetter*, upholding the validity of the designation statute will not insulate a distiller's invocation of the statute from scrutiny under the Sherman Act. The manner in which a distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be subject to Sherman Act analysis under the rule of reason.[8] There is no basis, however, for condemning the statute itself by force of the Sherman Act.[9]

---

[7] This is merely another way of stating that the designation statute might have an anticompetitive effect when applied in concrete factual situations. See *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S., at 110–111. We have explained, however, that this is insufficient to declare the statute itself void on its face.

[8] It is certainly conceivable, however, that particular *conduct* pursuant to the statute might be subject to a challenge under one or more of the established *per se* rules of illegality.

[9] Because of our resolution of the pre-emption issue, it is not necessary for us to consider whether the statute may be saved from invalidation

III

Respondents seek to support the judgment of the Court of Appeal on three federal grounds not considered by the court below. None of these contentions have merit.

A

Respondents contend that the California designation statute is pre-empted by § 5(a) of the Federal Alcohol Administration Act, 49 Stat. 981, as amended, 27 U. S. C. § 205(a).[10] Section 5(a) prohibits a distiller or wholesaler from establishing exclusive *retail* outlets. See S. Rep. No. 1215, 74th Cong., 1st Sess., 6–7 (1935); H. R. Rep. No. 1542, 74th Cong., 1st Sess., 10–11 (1935). In other words, § 5(a) prohibits a distiller or wholesaler from requiring a *retailer* to buy only the distiller's or wholesaler's products to the exclusion of the products of other distillers or wholesalers. The statute does not prohibit a distiller from requiring its wholesalers to purchase the distiller's products from the distiller itself rather

---

under the doctrine of *Parker* v. *Brown*, 317 U. S. 341 (1943), or under the Twenty-first Amendment.

[10] Section 5(a) provides:

"It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

"(a) Exclusive outlet

"To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce." 27 U. S. C. § 205(a).

than from a third party.[11] California's statute in no way requires exclusive retail outlets. By its terms, the designation statute does not even require exclusive wholesale arrangements. One might be able to hypothesize an arrangement enforced by the designation statute that might be prohibited by § 5(a), but this is insufficient to invalidate a state statute pursuant to the Supremacy Clause. "To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960).

B

Respondents contend that the designation statute denies them due process of law. According to respondents, California has established a "second tier of private licensing over the state's licensing process," and therefore procedural due process protections apply with regard to the distiller's designation decisions. Brief for Respondents 36.

We find this contention without merit. The designation statute merely enforces the distiller's decision to deny permission to a California wholesaler to deal in the distiller's products. We do not think that respondents possess any constitutionally protected liberty or property interest in obtaining the distiller's permission. Thus, the Due Process Clause is not offended by the wholesaler's inability to challenge the distiller's decisionmaking. What respondents are really challenging is the California Legislature's decision to give such a power to the distiller without establishing any criteria to govern the exercise of that power. The Due Process Clause does not authorize this Court to assess the wisdom of the California Legislature's decision. See *Ferguson* v. *Skrupa*, 372 U. S. 726, 729–732 (1963).

---

[11] See 27 CFR §§ 8.3, 8.11, 8.23 (1982).

C

Finally, respondents contend that the designation statute violates the Equal Protection Clause because it discriminates between designated and nondesignated wholesalers. There can be little doubt but that the designation statute is rationally related to the statute's legitimate purposes. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 461–470 (1981). The designation statute enables the distiller to place restraints on intrabrand competition in order to foster interbrand competition. It is not our province to determine whether or not California consumers would be better off had the California Legislature decided not to close off the "Oklahoma connection." See *Vance* v. *Bradley*, 440 U. S. 93, 109 (1979).

The judgment of the Court of Appeal is reversed, and these cases are remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE WHITE joins, concurring in the judgment.

Under the California designation statute, each distiller is empowered to decide whether to regulate its product distribution within California by designating those importers that may sell its product. The statute contemplates a private market decision but provides a nonmarket mechanism for enforcing the decision. Hybrid restraints of this character require analysis that is different from a public regulatory scheme on the one hand, see, *e. g.*, *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117; *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35,[1] and a purely private restraint on the other, see, *e. g.*, *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36; *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373. We have twice held that hybrid price-fixing restraints are prohibited by the Sherman Act. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384; *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97. In both cases the private decision to fix prices was unsupervised by the State but made effective by state law.

---

[1] The Court states that *Seagram & Sons* is "much like" these cases. *Ante*, at 662. Except for the fact that *Seagram & Sons* also involved a facial challenge against a state statute, the two cases are quite different. The New York statute involved in *Seagram & Sons* imposed a degree of

The facts of *Schwegmann*, involving the Louisiana marketing practices of two out-of-state distributors of gin and whiskey, are particularly instructive. The distributors sought to control the retail prices of their products by obtaining from individual retailers a written agreement that they would comply with the minimum retail price schedules established by the distributors. These resale price maintenance agreements, which otherwise violated the Sherman Act, were rendered lawful by the Miller-Tydings Act and a Louisiana fair trade law. But a New Orleans retailer refused to sign such an agreement and sold the distributors' products at cutrate prices. The distributors responded by seeking to enjoin the retailer from selling the products at less than the minimum prices fixed by their schedules. The basis for their complaint was a Louisiana statute that condemned as unfair competition a sale at less than the price stipulated in a fair trade contract, even though the particular retailer was not a party to that contract. This Court held that the Sherman Act, as amended by the Miller-Tydings Act, precluded enforcement of the nonsigner provision.

Even though the private agreements to fix resale prices were not unlawful, *Schwegmann* held that the distributor could not place the same restraint on the market by using the

---

public regulation of the market; it did not grant liquor distributors a degree of private regulatory power. The restraint on the market was, therefore, not of the hybrid character that distinguishes these cases from most antitrust cases.

state statute as a "*club.*" 341 U. S., at 395 (emphasis in original). The Court's holding teaches that a state statute that facilitates the manufacturer's decision to impose a vertical restriction is not lawful simply because the Sherman Act permits the manufacturer, if it has sufficient power in the private market, to impose that same restriction without the aid of the statute. In other words, a statute that gives distributors additional power over the wholesale or retail market to impose an otherwise permissible restraint might not pass muster under the Sherman Act.[2]

The inquiry in these cases therefore cannot simply be whether the Sherman Act would have been violated had the distillers obtained the control over their California distribution systems without the aid of the designation statute. For the distillers' power to impose resale restrictions on California importers has been drastically affected first by the Oklahoma "open wholesaling" and "free export" provisions and second by the California designation statute enacted as a response to the Oklahoma laws. It may be that the amount of distiller control over California importers under the two statutes is not significantly greater than the amount that would exist if neither State intervened in the private market. Contrary to the Court's perception, *ante*, at 662,[3] however, the character of control is different. For the designation statute gives the distillers direct authority over California importers,[4] whereas in the private market the distillers must persuade Oklahoma wholesalers not to resell to California importers. It is possible that, absent the state laws, the distillers would have insufficient market power to obtain and enforce such agreements. The designation statute therefore may give the distillers more power over California importers than was taken away by the Oklahoma laws.

---

[2] Whereas *Schwegmann* best illustrates the different treatment accorded purely private restraints and hybrid restraints, perhaps *Midcal* best illustrates the different treatment accorded hybrid restraints and public regulation of the market. In *Midcal* a California statute required distributors of wine to file either fair trade contracts or price schedules with the State. All California retailers were required to sell wine at the price the distributors fixed. Relying upon *Schwegmann*, the Court invalidated the statute. Even though the State presumably could regulate the wine market by fixing retail prices itself, it could not empower private parties to undertake such regulation.

[3] "Thus, California's designation statute merely restored what Oklahoma had taken away: the distiller's ability to determine which wholesalers may import its products into California."

The validity of the designation statute obviously presents a more difficult question than was presented in *Schwegmann* and *Midcal*.[5] For in both cases the Court had the benefit of a conclusive presumption that resale price maintenance is anticompetitive. This case, however, not only involves a species of vertical nonprice restriction with respect to which there are no sure rules relating to effect on competition; it also involves a nonmarket enforcement mechanism that, according to *Schwegmann*, can make the difference between legality and illegality. The statute conceivably could create such an unacceptable and unnecessary risk of anticompetitive effect as to result in its invalidation. The removal of the Oklahoma legal obstacle to the purely private imposition of vertical restrictions in the California liquor market significantly enhances this possibility.

---

[4] Unless an importer is expressly designated, it may not lawfully sell the distiller's products within California.

[5] Under the Sherman Act, a manufacturer may choose the wholesalers with whom it will do business. It may also place certain reasonable restrictions on each wholesaler as a condition of doing business. *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36. Subject to the exception recognized in *United States* v. *Colgate & Co.*, 250 U. S. 300, it may not, however, dictate the price at which the wholesaler must sell the product to retailers or to ultimate consumers. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373. From these different rules governing the purely private decisions of manufacturers, it follows that a state statute that facilitates resale price maintenance and a state statute that facilitates other vertical restrictions are also subject to different antitrust analyses.

I agree with the Court that our price-fixing cases do not require the invalidation of the designation statute. The question on remand should be whether the statute's provision to distillers of an additional club over California importers affords distillers an unreasonable degree of unsupervised power to regulate their distribution practices that they would not otherwise enjoy under a free market. Because that question cannot be determined without a more sophisticated inquiry, I concur in the Court's judgment.

FLORIDA DEPARTMENT OF STATE *v.* TREASURE SALVORS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-1348. Argued January 20, 1982—Decided July 1, 1982

After respondents had located the wreck of a 17th-century Spanish galleon off the Florida coast, Florida immediately claimed ownership of the galleon pursuant to a Florida statute. Contracts were then entered into between the Florida Division of Archives, as owner of the galleon and its cargo, and respondents, whereby respondents agreed to conduct underwater salvage operations in exchange for the Division's agreement to transfer ownership of 75% of the appraised value of all material recovered from the galleon to respondents. The contracts did not purport to transfer ownership of any property to the Division. Ultimately, many valuable artifacts of the galleon were discovered. In the meantime, in proceedings unrelated to the salvage operations, it was held in *United States* v. *Florida*, 420 U. S. 531, that, as against Florida, the United States was entitled to the lands, minerals, and other natural resources in the area in which the remains of the galleon had come to rest. Respondents thereafter filed an admiralty *in rem* action in the Federal District Court for the Southern District of Florida, naming the galleon as defendant but not the State of Florida and seeking a declaration of title to the galleon. Throughout the ensuing proceedings, in which the United States intervened and in which both the District Court and the Court of Appeals on appeal rejected the United States' claim to ownership of the galleon, some of the valuable artifacts remained in the custody of officials of the Florida Division of Archives in Tallahassee, which is located beyond the District Court's territorial jurisdiction. After the Court of Appeals' decision, respondents filed a motion in the District Court for an order commanding the United States Marshal to arrest and take custody of those artifacts and bring them within the court's jurisdiction. The District Court granted the motion and issued a warrant of arrest. Although the warrant was addressed to the state officials, the State itself filed a motion to quash the warrant, but the court denied this motion, ruling that the extraterritorial seizure was proper under Supplemental Admiralty Rule C(5), and issued an order to show cause why the State should not deliver the artifacts into the Marshal's custody. The State then argued that the Eleventh Amendment barred exercise of the District Court's jurisdiction, but the District Court rejected this argument, holding that the State had waived the Eleventh Amendment as to any claim to the property, and that, apart from any such claim, the Eleventh Amendment did not bar the seizure of the artifacts and subsequent transfer to the Marshal's custody. On the merits, the court also rejected the State's claim to the property based on the salvage contracts with respondents. The Court of Appeals affirmed.

Held: The judgment is affirmed in part and reversed in part.

621 F. 2d 1340, affirmed in part and reversed in part.

JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concluded that:

1. The Eleventh Amendment did not bar the process issued by the District Court to secure possession of the artifacts held by the state officials. Pp. 683–699.

(a) The Eleventh Amendment, while barring an action directly against the state itself or any agency thereof, does not bar an action against a state official that is based on the theory that the official acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional. The Eleventh Amendment, however, limits the relief that may be recovered in the latter kind of action; the judgment may not compel the State to use its funds to compensate the plaintiff for his injury. Pp. 683–690.

(b) Here, the process at issue is not barred by the Eleventh Amendment as a direct action against the State, because it was directed only at state officials. Neither the fact that the State elected to defend on behalf of the officials, nor the fact that the District Court purported to adjudicate the State's rights, deprives that court of jurisdiction that had been properly invoked over other parties. Pp. 691–692.

(c) The state officials named in the warrant of arrest do not have a colorable claim to possession of the artifacts, and thus may not invoke the Eleventh Amendment to block execution of the warrant. The salvage contracts, whether valid or not, provide no authority for the officials' refusal to surrender possession of the artifacts, and no statutory provision that even arguably would authorize the officials to retain the artifacts has been advanced. Pp. 692–697.

(d) The relief sought by respondents is not barred by the Eleventh Amendment but is consistent with the principles of *Edelman* v. *Jordan*, 415 U. S. 651. The warrant of arrest sought possession of specific property. It did not seek any attachment of state funds and would impose no burden on the state treasury. And respondents are not asserting a claim for damages against either the State or its officers. Pp. 697–699.

2. The proper resolution of the Eleventh Amendment issue does not require—or permit—a determination of the State's ownership of the arti-

facts, and hence the Court of Appeals improperly adjudicated the State's right to the artifacts. Pp. 699–700.

JUSTICE BRENNAN while agreeing with the opinion that the State of Florida has not established even a colorable claim to the artifacts, concluded that the Eleventh Amendment is inapplicable in this case because both respondents are Florida corporations and thus the suit was not "commenced or prosecuted against one of the United States by citizens of *another* State," as the Eleventh Amendment provides. Pp. 700–702.

JUSTICE WHITE, joined by JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, concurred in the Court's judgment insofar as it reverses the Court of Appeals' determination of the State's ownership of the artifacts. P. 703, n.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which BURGER, C. J., and MARSHALL and BLACKMUN, JJ., joined. BRENNAN, J., filed an opinion conncurring in the judgment in part and dissenting in part, *post*, p. 700. WHITE, J., filed an opinion concurring in the judgment in part and dissenting in part, in which POWELL, REHNQUIST, and O'CONNOR, JJ., joined, *post*, p. 702.

Susan Gamble Smathers, Assistant Attorney General of Florida, argued the cause *pro hac vice* for petitioner. With her on the briefs were *Jim Smith*, Attorney General, and *Sidney H. McKenzie III*.

David Paul Horan argued the cause and filed a brief for respondents.*

---

*A brief for the State of Alabama et al. as *amici curiae* urging reversal was filed by *Rufus L. Edmisten*, Attorney General of North Carolina, *W. A. Raney, Jr.*, Special Deputy Attorney General, and *Daniel C. Oakley*, Assistant Attorney General; *Charles A. Graddick*, Attorney General of Alabama; *Wilson L. Condon*, Attorney General of Alaska; *Robert C. Hight, Jack E. Rump; Tany S. Hong*, Attorney General of Hawaii; *Tyrone C. Fahner*, Attorney General of Illinois; *William J. Guste, Jr.*, Attorney General of Louisiana; *Stephen H. Sachs*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *William A. Allain*, Attorney General of Mississippi; *Daniel R. McLeod*, Attorney General of South Carolina; *Mark White*, Attorney General of Texas; *Donald M. Bouton*, Acting Attorney General of the Virgin Islands; *Aviata F. Faalevao*, Attorney General of American Samoa; and *Jack Avery*, Attorney General of the Government of Guam.

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE MARSHALL, and JUSTICE BLACKMUN joined.

In this admiralty *in rem* action, a federal court attempted to arrest property held by two state officials and bring it within the jurisdiction of the court. The property—artifacts of the *Nuestra Senora de Atocha*, a 17th-century Spanish galleon—was discovered by respondents on the floor of the ocean in international waters. The question presented is whether the Eleventh Amendment immunized the property from the federal court's process.

I

Battered by a tropical hurricane, the *Nuestra Senora de Atocha*, a Spanish galleon carrying a cargo of New World treasure to King Philip IV of Spain, sank in 1622, 40 nautical miles west of what is today Key West, Fla. After years of searching the ocean floor and studying Spanish archives in Seville, respondent Treasure Salvors[1] located the wreck site in the spring of 1971 near shoals known as the "Quicksands," nine and one-half nautical miles west of the Marquesas Keys.[2]

The State of Florida immediately claimed that the *Atocha* belonged to the State. The State claimed ownership pursuant to Fla. Stat. § 267.061(1)(b) (1974), which then provided:[3]

> "It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archeological value *which have been abandoned on state-owned lands or*

---

[1] The two respondents in this action, Treasure Salvors, Inc., and Armada Research Corp., were organized by the same parties. Throughout these proceedings they have been treated as a single entity referred to as "Treasure Salvors."

[2] The story of the *Atocha* and its discovery is recounted in Lyon, The Trouble with Treasure, 149 National Geographic 787 (1976).

[3] The statute since has been amended in a manner not relevant to this case.

> *state-owned sovereignty submerged lands* shall belong to the state with the title thereto vested in the division of archives, history, and records management of the department of state for the purpose of administration and protection." (Emphasis added.)

Officials of the Florida Division of Archives threatened to arrest Mel Fisher, president of Treasure Salvors, and to confiscate the boats and equipment of Treasure Salvors if it commenced salvage operations on the *Atocha* without a salvage contract from the State. Under this threat of arrest, Treasure Salvors executed a one-year contract with the State that permitted it to conduct underwater salvage operations on the vessel.[4] Similar contracts were executed during each of the three succeeding years.

Each of the contracts was expressly predicated on the assumption that the *Atocha* was the property of the State of Florida because it had been found on submerged lands within the boundaries of the State. The contracts permitted Treasure Salvors "to conduct underwater salvage from and upon certain submerged sovereignty lands of and belonging to the State of Florida." App. 20. After describing in metes and bounds an area claimed to be "lying and being in Monroe County, Florida," the contract provided that the shipwreck site "is to be worked for the purpose of salvaging abandoned vessels or the remains thereof including, but not limited to, relics, treasure trove and other materials related thereto and located thereupon and therein, *which abandoned material is the property of the State of Florida.*" *Id.*, at 22 (emphasis added). The contract further provided:

---

[4] The District Court found that the contract was entered into as a result of the "coercive acts of the Division of Archives in threatening arrest and confiscation." *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507, 522 (SD Fla. 1978). The State admits that if Treasure Salvors had salvaged without a contract arrests would have been made. Tr. of Oral Arg. 9.

> "In payment for the Salvager's satisfactory performance and compliance with this Agreement, the Division will award to the Salvager seventy-five percent (75%) of the total appraised value of all material recovered hereunder, which payment shall be made at the time division of such material is made by the parties hereto. Said payment may be made in either recovered material or fair market value, or in a combination of both, at the option of the Division's director." *Id.*, at 32–33.

The bargain, in brief, was between the Division of Archives, as the owner of the *Atocha* and its cargo, and Treasure Salvors, as a contractor that agreed to perform services for the Division. Treasure Salvors agreed to pay the Division $1,200 each year, to post a performance bond, and to perform its work in a specified manner, all in exchange for the Division's agreement to transfer ownership of 75% of the proceeds of the operation—or its equivalent—to Treasure Salvors. The contracts did not purport to transfer ownership of any property to the Division of Archives; the State's claim to the property was predicated entirely on a provision of state law.

In its attempt to salvage the lost treasure of the *Atocha*, Treasure Salvors was immensely successful. The salvager held some of the artifacts at its headquarters in Key West, while state officials held the remainder at the Division of Archives in Tallahassee. All of the property was deemed to belong to the State, however, subject to a subsequent distribution in which Treasure Salvors would receive its 75% contractual share.

In proceedings unrelated to the salvage operation, the United States and the State of Florida were engaged in litigation to determine the seaward boundary of submerged lands in the Atlantic Ocean and the Gulf of Mexico in which the State had rights to natural resources. In February 1974, a Special Master filed a Report that defined Florida's boundary landward of the site of the wreck of the *Atocha*. The State's objections to the Report were overruled. *United States* v. *Florida*, 420 U. S. 531 (1975).[5] A final decree was entered providing that, as against the State of Florida, the United States was entitled to the lands, minerals, and other natural resources in the area in which the remains of the *Atocha* had come to rest. *United States* v. *Florida*, 425 U. S. 791 (1976).[6]

After this Court overruled Florida's exceptions to the Special Master's Report, Treasure Salvors filed a complaint in the Federal District Court for the Southern District of Florida demanding that "Plaintiffs be put into possession of the ATOCHA and other property and that all other persons, firms, and corporations or government agencies be enjoined from interfering with Plaintiffs title, possession, and property," and that "Plaintiffs title be confirmed against all claimants and all the world." App. 9. The complaint invoked the court's admiralty and maritime jurisdiction pursuant to Federal Rule of Civil Procedure 9(h) and, as an admiralty action *in rem*, named the *Atocha* as defendant. Items recovered from the *Atocha* in Treasure Salvors' possession were duly served with process and brought into the custody of the court. Most of the remainder of the wreck and its valuable cargo lay buried under sand in international waters; state officials held other artifacts in Tallahassee. No attempt was made at this time to serve the artifacts in Tallahassee.

The United States intervened in the action as a party-defendant and filed a counterclaim seeking a declaratory judgment that the United States was the proper owner of the

---

[5] In its exceptions to the Special Master's Report, the State contended that the Master should have recognized that the boundaries of the State extended to the boundaries defined in the State's 1868 Constitution, rather than to the limits specified in the Submerged Lands Act of 1953. See 420 U. S., at 532. This Court considered that exception and held that the Master had properly rejected the State's argument. *Id.*, at 533.

[6] This area is on the Continental Shelf of the United States, in international waters. *Treasure Salvors, Inc.* v. *Abandoned Sailing Vessel*, 408 F. Supp. 907, 909 (SD Fla. 1976).

Atocha.[7] The District Court rejected the Government's claim of ownership and held that "possession and title are rightfully conferred upon the finder of the res derelictae." *Treasure Salvors, Inc.* v. *Abandoned Sailing Vessel*, 408 F. Supp. 907, 911 (1976). The court entered judgment in favor of Treasure Salvors "against the United States of America and all other claimants." Record 270.[8]

The Court of Appeals affirmed the judgment of the District Court as against the United States, but modified its decree. *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F. 2d 330 (CA5 1978). The United States had argued that the District Court lacked *in rem* jurisdiction to determine rights of the parties to that portion of the *Atocha* lying beyond the territorial jurisdiction of the court. The Court of Appeals agreed that the District Court lacked *in rem* jurisdiction over those portions of the res located outside the district; the court noted that for a court to exercise admiralty *in rem* jurisdiction the res itself must be brought within the district and seized by the court. *Id.*, at 333. The appellate court held, however, that by intervening in the action and stipulating to the court's admiralty jurisdiction the Government had "waived the usual requirement that the *res* be present within the territorial jurisdiction of the court and consented to the court's jurisdiction to determine its interest in the extraterritorial portion of the vessel." *Id.*, at 335. The court concluded that jurisdiction thus existed to determine claims of the United States to those portions of the *Atocha* lying beyond the territorial jurisdiction of the court, but not claims of other parties who had not appeared and submitted to the jurisdiction of the court.[9] On the merits, the Court of Appeals rejected the statutory and common-law claims advanced by the United States.

---

[7] The United States asserted a right of ownership under several federal statutes and the common-law doctrine of "sovereign prerogative." The State of Florida did not intervene at this time. It had notice of the litigation, however, and both assisted the United States in the lawsuit and entered into preliminary negotiations with the United States Department of the Interior regarding disposition of the *Atocha*'s treasure in the event the Federal Government prevailed. See 621 F. 2d 1340, 1343–1344 (CA5 1980).

[8] The court explained: "General principles of maritime and international law dictate that an abandonment constitutes a repudiation of ownership, and that a party taking possession under salvage operations may be considered a finder under the doctrine of 'animus revertendi,' i. e., the owner has no intention of returning. Ownership in the vessel would then vest in the finder by operation of law." 408 F. Supp., at 909 (citation omitted).

Throughout these proceedings, valuable artifacts of the *Atocha* remained in the custody of officials of the Florida Division of Archives in Tallahassee. Since Tallahassee is located in the Northern District of Florida, these artifacts also were located beyond the territorial jurisdiction of the District Court. Immediately following the decision of the Court of Appeals, Treasure Salvors filed a motion in the District Court for an order commanding the United States Marshal to arrest and take custody of these artifacts and bring them within the jurisdiction of the court. Record 318. That motion forms the basis of the present controversy.

The District Court issued a warrant to arrest.[10] Although

---

[9] The court stated:

"[T]he district court properly adjudicated title to all those objects within its territorial jurisdiction and to those objects without its territory as between plaintiffs and the United States. In affirming the district court, we do not approve that portion of its order which may be construed as a holding that plaintiffs have exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claimants, if any there be, who are not parties or privies to this litigation." 569 F. 2d, at 335–336 (footnote omitted).

[10] The warrant provided:

"WARRANT FOR ARREST IN REM

"THE PRESIDENT OF THE UNITED STATES OF AMERICA
"TO: THE MARSHAL OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF FLORIDA
"GREETING:

"WHEREAS, on the 18th day of July, 1975, Treasure Salvors, Inc., a corporation and Armada Research Corporation, a corporation, filed a Comthe warrant was addressed to two officers of the Division of Archives, the State itself filed a motion to quash the warrant, contending that the State of Florida was not a party in the case and had not waived the requirement that the court could exercise *in rem* jurisdiction only over that portion of the res within the territorial boundaries of the court. App. 43.[11] The State also sought and obtained an emergency stay from the Court of Appeals. Record 368. The District Court denied the motion to quash, ruling that the extraterritorial seizure was proper under Supplemental Admiralty Rule C(5).

---

plaint under Rule 9(h) against the Unidentified Wrecked and Abandoned Sailing Vessel, her tackle, armament, apparel and cargo located with 2500 yards of a *[sic]* at coordinates 24° 31.5′ North Latitude and 82° 20′ West Longitude, said sailing vessel believed to be the NUESTRA SENORA DE ATOCHA for the reasons in said Complaint, and

"WHEREAS, in November of 1975 Notice of said claim was published in a newspaper of general circulation within the District, and

"WHEREAS, the State of Florida nor any of its agencies, agents, or employees, did appear in this cause to defend or prosecute any claim that they might have to any portions of said vessel that were in their possession, custody, care or control.

"NOW, THEREFORE, you are hereby commanded to take into your possession the portions of said vessel which have been in the possession or are in the possession of L. Ross Morrell and/or James McBeth, or under their custody, care or control and to bring said portions of said vessel within the jurisdiction of this Honorable Court and transfer possession of same to the substitute custodian appointed in this action." App. 40–42.

[11] The State also asserted:

"A contract was entered into between Armada Research Corporation and the State of Florida on December 3, 1974 and was for a good and valid consideration. The contract alone determined the rights and obligations of the contracting parties and was in no way affected by [the decision of this Court in] United States v. Florida. This contract was fully executed and performed prior to the United States v. Florida *[sic]*." *Id.*, at 44.

In response to the State's assertion that the contracts determined the rights of the contracting parties, Treasure Salvors filed a supplemental complaint in federal court. Record 369. The complaint sought a declaratory judgment that the contracts between Treasure Salvors and the State were void.

App. 51.[12] Since the Court of Appeals had stayed execution of the warrant, the District Court issued an order to show cause why the State should not deliver the artifacts into the custody of the Marshal.[13]

In response to the order to show cause, the State raised several substantive issues in the District Court. Record 425. Contending that a supplemental complaint filed by Treasure Salvors, see n. 11, *supra*, demonstrated that the State of Florida was a defendant in the action, the State argued that the Eleventh Amendment barred an exercise of the court's jurisdiction. The State also repeated its arguments that the court lacked *in rem* jurisdiction in admiralty because the res was not present within the district and that the decision of this Court in *United States* v. *Florida* did not affect the State's "contractual" right to a share of the artifacts. Record 429–439.

The District Court rejected these arguments in a comprehensive memorandum. *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507 (1978). The court first held that, just as all claims of the

---

[12] The court also held that, in light of the State's claim that it had a contractual right to 25% of the res, "the State of Florida has waived the general requirement that the *res* be within the territorial jurisdiction of the court and, further, has consented to the court's jurisdiction over its interest in any portions of the vessel." App. 59.

[13] The Court of Appeals then dissolved the emergency stay. *Id.*, at 65. The court ordered: "The United States Marshal may execute the warrant of arrest and upon doing so shall forthwith deliver custody of all of the items in question to a custodian who will take possession of them *in situ* and shall place them under lock or seal at their present location and hold them secure." *Id.*, at 68. The appellate court denied a motion for reconsideration that had contended that the District Court lacked jurisdiction. "The question of the jurisdiction of the District Court for the Southern District of Florida is for that court to determine in the first instance on the basis of such record as may be developed in that court." *Id.*, at 69. To expedite the litigation, Treasure Salvors agreed to permit the State to serve as substitute custodian. The warrant was executed and, with the State serving as custodian, the artifacts came into the control of the United States Marshal.

United States had been resolved in the earlier proceeding, all claims of the State were barred because the State of Florida had acted in privity with the United States in that proceeding. *Id.*, at 512; see n. 7, *supra.* Alternatively, the court held that the extraterritorial arrest of the salvaged articles was proper under Supplemental Admiralty Rule C(5) and that the court thus had obtained jurisdiction *in rem* to resolve ownership of the res. 459 F. Supp., at 518. On the merits, the court rejected on multiple grounds the State's contractual claim to the property. *Id.*, at 521.

At the conclusion of its memorandum opinion, the court rejected the State's Eleventh Amendment defense. *Id.*, at 526. The court first held that the State necessarily had waived the Amendment as to any claim to the property that it asserted in federal court. *Ibid.* The court then held that, apart from any claim advanced by the State, the Eleventh Amendment did not bar the seizure of the artifacts and subsequent transfer to the custody of the Marshal.[14]

---

[14] The court asserted several grounds in support of this decision. Essentially, the court held: "There is no Eleventh Amendment bar to the mere arrest of articles of salvage unless the state is the owner. If the state is not the owner, the court may proceed." 459 F. Supp., at 527. The court concluded that ownership is thus a "jurisdictional" fact and, citing *United States* v. *Mine Workers*, 330 U. S. 258, noted that "[i]t is axiomatic that the federal courts have jurisdiction to determine jurisdiction." 459 F. Supp., at 527. The court held that no Eleventh Amendment bar existed because "[t]his Court finds as fact that the Division of Archives is not and never was the rightful owner of the articles of salvage from the ship *Atocha* that were seized by the ancillary warrant of arrest and which have been improperly removed and held by the Division of Archives; that the Division of Archives is not the owner of any right or interest in such property based upon the purported and invalid contract with Treasure Salvors; and that the Division of Archives was wrongfully withholding a portion of the *res* of the *Atocha* over which this Court was properly exercising *in rem* jurisdiction." *Ibid.*

On the basis of its memorandum, the court

"ORDERED and ADJUDGED and DECREED that Treasure Salvors, Inc. and Armada Research Corp. have full right and title to articles arrested and that they are entitled to possession and that the United States

The Court of Appeals affirmed. 621 F. 2d 1340 (CA5 1980). As had the District Court, see n. 14, *supra*, the court concluded that the Eleventh Amendment did not prevent the court from resolving the controverted claims to ownership of the res, since resolution of that dispute was essential to a determination of whether the Eleventh Amendment in fact barred an exercise of jurisdiction by the federal court. 621 F. 2d, at 1345.[15] The court then held that the extraterritorial process issued pursuant to Supplemental Admiralty Rule C(5) was proper, *id.*, at 1346, and that the State did not have a valid claim to the property. *Id.*, at 1349.[16]

The Florida Department of State filed a petition for writ of certiorari, presenting only one question: "Whether the Eleventh Amendment to the United States Constitution bars an in rem admiralty action seeking to recover property owned by a state." Pet. for Cert. I. We granted the petition. 451 U. S. 982. We hold that the federal court had jurisdiction to secure possession of the property from the named state officials, since they had no colorable basis on which to retain possession of the artifacts. The court did not have power, however, to adjudicate the State's interest in the property without the State's consent.

Marshal, who has possession and control of such articles, shall deliver them to Treasure Salvors, Inc. and Armada Research Corp." App. 85.

Pursuant to this order, Treasure Salvors eventually received—under certain restrictions—the artifacts that the State held as custodian for the court. Record 554.

[15] The court noted that this result was particularly compelling in admiralty *in rem* actions. The court reasoned that, since federal courts have exclusive jurisdiction over such actions, if the mere assertion of ownership by a State were sufficient to invoke the Amendment, petitioners such as Treasure Salvors would be stranded without a forum in which to litigate their claim. 621 F. 2d, at 1346, n. 19.

[16] The court neither affirmed nor reversed the District Court's holding that Florida was in privity with the United States and therefore bound by the earlier decision of the Court of Appeals. *Id.*, at 1344, n. 17.

II

Stripped of its procedural complexities and factual glamor, this case presents a narrow legal question. The District Court attempted to seize artifacts held by state officials and to bring the property within its admiralty *in rem* jurisdiction. Although the seizure in this case was extraterritorial, and thus involved an application of Supplemental Admiralty Rule C(5), the question presented for our decision would not be any different if the State merely resisted an attachment of property located within the district.

In response to the warrant of arrest, the State contended that it was immune from the federal process under the Eleventh Amendment.[17] It argued that the contracts executed with Treasure Salvors "alone determined the rights and obligations of the contracting parties . . . ." App. 44. The difficult question presented in this case is whether a federal court exercising admiralty *in rem* jurisdiction may seize property held by state officials under a claim that the property belongs to the State.[18]

---

[17] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Although the Amendment does not literally apply to actions brought against a State by its own citizens, the Amendment long has been held to govern such actions. *Hans* v. *Louisiana*, 134 U. S. 1. See *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279, 280; *Edelman* v. *Jordan*, 415 U. S. 651, 662. Nor does the Amendment literally apply to proceedings in admiralty. Again, however, the Court has found it to govern certain admiralty actions. See *In re New York*, 256 U. S. 490, 500.

[18] The fact that the State appeared and offered defenses on the merits does not foreclose consideration of the Eleventh Amendment issue; "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it may be raised at any point of the proceedings. *Edelman* v. *Jordan*, *supra*, at 678; see *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459, 467 ("The Eleventh Amendment declares a policy

A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity. *Alabama* v. *Pugh*, 438 U. S. 781. If the State is named directly in the complaint and has not consented to the suit, it must be dismissed from the action. *Id.*, at 782.[19] Of course, the fact that the State should have been dismissed from an action that has proceeded to judgment does not mean that the judgment may not stand against other parties who are not immune from suit.[20]

The Eleventh Amendment does not bar all claims against officers of the State, even when directed to actions taken in their official capacity and defended by the most senior legal officers in the executive branch of the state government. In *Ex parte Young*, 209 U. S. 123, the Court held that an action brought against a state official to enjoin the enforcement of an unconstitutional state statute is not a suit against a State barred by the Eleventh Amendment. In response to the argument that the official in such a case could act only as an officer of the State and that the suit therefore could be characterized only as an action against the State itself, the Court explained:

> "The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce

---

and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court").

[19] But see *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, 456 ("Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts"); see also *Hutto* v. *Finney*, 437 U. S. 678; *Maher* v. *Gagne*, 448 U. S. 122.

[20] Thus, in *Alabama* v. *Pugh*, our holding that the State of Alabama and the Alabama Board of Corrections should have been dismissed as parties did not affect the substance of the relief granted against a number of Alabama officials responsible for the administration of its prison system.

> an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce is a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*, at 159–160.

There is a well-recognized irony in *Ex parte Young;* unconstitutional conduct by a state officer may be "state action" for purposes of the Fourteenth Amendment yet not attributable to the State for purposes of the Eleventh. Nevertheless, the rule of *Ex parte Young* is one of the cornerstones of the Court's Eleventh Amendment jurisprudence. See *Edelman* v. *Jordan*, 415 U. S. 651, 663–664; *Quern* v. *Jordan*, 440 U. S. 332, 337.

In *Tindal* v. *Wesley*, 167 U. S. 204, the Court applied the analysis later enshrined in *Ex parte Young* in a suit to recover property wrongfully held by state officials on behalf of the State of South Carolina. In *Tindal*, the plaintiff claimed title and a right of possession to certain real property held by a state official; the defendant answered that the property belonged to the State and asserted the Eleventh Amendment as a defense to the action. The Court described the issue presented for decision:

> "So that the question is directly presented, whether an action brought against individuals to recover the possession of land of which they have actual possession and con-

> trol, is to be deemed an action against the State within the meaning of the Constitution, simply because those individuals claim to be in rightful possession as officers or agents of the State, and assert title and right of possession in the State. Can the court, in such an action, decline to inquire whether the plaintiff is, in law, entitled to possession, and whether the individual defendants have any right, in law, to withhold possession? And if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the State is without legal foundation, may it not, as between the plaintiff and the defendants, adjudge that the plaintiff recover possession?" 167 U. S., at 212.

Relying extensively on the earlier decision in *United States* v. *Lee*, 106 U. S. 196,[21] the Court in *Tindal* held that the "settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf." 167 U. S., at 221. The Court refused to accept the proposition that the "doors of the courts of justice are . . . closed against one legally entitled to possession, by the mere assertion of the defendants that they are entitled to possession for the State." *Id.*, at 222. In explaining the extent of its decision, the Court stated:

---

[21] In *Lee*, the plaintiff brought an action in ejectment in federal court to recover the Virginia estate of General Robert E. Lee. The estate had been acquired by the United States for nonpayment of taxes, although the taxes in fact had been tendered by a third party. Once in possession, the Government had established a federal military installation and a national cemetery on the property. The plaintiff brought suit against the governmental custodians of the estate, who pleaded the sovereign immunity of the United States as a defense. This Court upheld a trial court judgment in favor of the plaintiff, on the ground that the defendants' possession of the estate was unlawful. The Court held that a suit against the federal officers under such circumstances was not a suit against the sovereign. Although *Lee* involved the sovereign immunity of the United States, the Court in *Tindal* stated that "it cannot be doubted that the question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States." 167 U. S., at 213.

> "[T]he Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without the authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured . . . be not one against the State, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State." *Ibid.*[22]

In holding that the action was not barred by the Eleventh Amendment, the Court in *Tindal* emphasized that any judgment awarding possession to the plaintiff would not subsequently bind the State. "It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff," *id.*, at 223; "it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute." *Ibid.*

---

[22] The Court continued:

"Any other view leads to this result: That if a State, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law, *Chicago, Burlington &c. Railroad* v. *Chicago*, 166 U. S. 226, 236, 241, the citizen is remediless so long as the State, by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated." *Id.*, at 222.

The rule of law set forth in *United States* v. *Lee* and *Tindal* v. *Wesley* was clarified in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682. In that case the plaintiff brought suit against a Government official to compel specific performance of a contract.[23] The plaintiff theorized that by withholding delivery of property as required by the contract the agent had exceeded his official authority and could be sued in federal court. The Court in *Larson* stated that "the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in a particular case, are constitutionally void." *Id.*, at 701–702. The Court held that the fact that an officer wrongfully withholds property belonging to another does not necessarily establish that he is acting beyond the permissible scope of his official capacity.[24] Since

---

[23] The plaintiff had contracted to purchase surplus coal from the War Assets Administration; the Administrator of that agency had withheld delivery and entered a new contract to sell the coal on the ground that the plaintiff had failed to perform a condition precedent to delivery. The plaintiff contended that title to the coal had passed at the time the contract was made, so that the Administrator was wrongfully withholding property that belonged to him.

[24] The Court stated:

"The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet [the requirement that the action to be restrained or directed is not action of the sovereign]. True, it establishes a wrong to the plaintiff. But it does not establish that in *Larson* it was not alleged that the Government official had exceeded his statutory authority—indeed, the plaintiff had affirmatively contended that the officer had authority to bind the Government on the contract at issue[25]—or that the exercise of such authority was unconstitutional,[26] the Court held that the action was barred by sovereign immunity.

These cases make clear that the Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional. In such an action, however, the Amendment places a limit on the relief that may be obtained by the plaintiff. If the action is allowed to proceed against the officer only because he acted without proper authority, the judgment may not compel the State to use its funds to compensate the plaintiff for the injury. In *Edelman* v. *Jordan*, 415 U. S. 651, the Court made clear that "a suit by pri-

---

the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereign's and a suit to enjoin it may not be brought unless the sovereign has consented." 337 U. S., at 693.

The Court explicitly rejected the argument that "the commission of a tort cannot be authorized by the sovereign." *Ibid.;* see also *id.*, at 695.

[25] The Court found that the Administrator "was empowered by the sovereign to administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment." *Id.*, at 692. "A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell." *Ibid.* The Court also noted that the "very basis of the respondent's action is that the Administrator was an officer of the Government, validly appointed to administer its sales program and therefore authorized to enter, through his subordinates, into a binding contract concerning the sale of the Government's coal." *Id.*, at 703.

[26] The Court held that there could be no claim that the Administrator's actions constituted an unconstitutional taking of property without compensation because the plaintiff had a remedy, in a suit for breach of contract, in the Court of Claims. *Id.*, at 703, n. 27.

vate parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.*, at 663. See *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459; *Quern* v. *Jordan*, 440 U. S., at 337.[27] In determining the relief that may be granted if a state officer is found to have acted without valid statutory authority, the question is whether the relief "constitute[s] permissible prospective relief or a 'retroactive award which requires the payment of funds from the state treasury.'" *Quern* v. *Jordan*, *supra*, at 346–347.

III

In light of the principles set forth above, the proper resolution of the Eleventh Amendment issue raised in this case requires an answer to each of three specific questions: (a) Is this action asserted against officials of the State or is it an action brought directly against the State of Florida itself? (b) Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (c) Is the relief sought by Treasure Salvors permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury"?

---

[27] This principle is not absolute. As noted, n. 19, *supra*, Congress may authorize a suit against a State—pursuant to § 5 of the Fourteenth Amendment—that would entail the payment of public funds from the state treasury. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445; *Hutto* v. *Finney*, 437 U. S. 678. Moreover, a prospective decree that has an "ancillary effect" on the state treasury "is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Edelman* v. *Jordan*, 415 U. S., at 668; see also *Milliken* v. *Bradley*, 433 U. S. 267, 288. Finally, "[w]hile it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury . . . damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Scheuer* v. *Rhodes*, 416 U. S. 232, 238.

A

Treasure Salvors filed this admiralty *in rem* action in federal court, seeking a declaration of title to an abandoned sailing vessel that had been discovered on the ocean floor. The State of Florida was not named as a party and was not compelled to appear. Some of the property at issue, however, was held by officials of the Florida Division of Archives. Asserting that it was the rightful owner of the property, Treasure Salvors filed a motion "for an Order commanding the United States Marshal to arrest and take custody of those portions of the Plaintiffs' vessel now being held by L. Ross Morrell or James McBeth or being held under their custody, care or control." App. 11.[28] As requested, the District Court issued a warrant of arrest commanding the Marshal of the United States for the Southern District of Florida "to take into your possession the portions of said vessel which have been in the possession or are in the possession of L. Ross Morrell and/or James McBeth, or under their custody, care or control and to bring said portions of said vessel within the jurisdiction of this Honorable Court and transfer possession of same to the substitute custodian appointed in this action." *Id.*, at 41–42. It is this process from which the State contends it is immune under the Eleventh Amendment.[29]

It is clear that the process at issue was directed only at state officials and not at the State itself or any agency of the State.[30] Neither the fact that the State elected to defend on behalf of its agents, nor the fact that the District Court purported to adjudicate the rights of the State, deprived the federal court of jurisdiction that had been properly invoked over other parties. See *Alabama* v. *Pugh*, 438 U. S. 781; n. 20, *supra*. The process thus is not barred by the Eleventh Amendment as a direct action against the State.

---

[28] The motion identified L. Ross Morrell as the Director of the Division of Archives and James McBeth as the Bureau Chief of the Historical Museum of the Division of Archives. App. 15.

[29] As noted, the State immediately filed a motion to quash the warrant. *Id.*, at 43. Although that effort failed, the State asserted an Eleventh Amendment defense in its attempt to defeat a transfer of the property—and thus ultimate execution of the warrant—to Treasure Salvors. Record 422.

[30] As noted, n. 11, *supra*, Treasure Salvors filed a supplemental complaint seeking a declaratory judgment that its contracts with the State

B

The second question that must be considered is whether the state officials named in the warrant acted without legitimate authority in withholding the property at issue. In Treasure Salvors' first response to the State's Eleventh Amendment argument, it contended:

> "If the Division of Archives were allowed to retain this property, its officials would be acting outside the scope of their authority under state law since the state statute under which they claim [does] not apply outside the states territory. The rationale of *Home Tel. & Tel. Co.* v. *Los Angeles*, [227 U. S. 278 (1913),] prohibits this result since to allow such action would be to deprive Treasure Salvors of their property without due process in viola-

---

were void. This action might be characterized as an action against the State itself. The District Court emphasized, however, that "the warrant was *not* issued in response to Treasure Salvors' Supplemental Complaint for Declaratory Judgment and Other Relief which was filed April 17, 1978." 459 F. Supp., at 526 (emphasis in original).

The order to show cause entered by the District Court was addressed directly to the State of Florida. See App. 63. That order was issued, however, only after the State itself had filed a motion to quash the warrant. *Id.*, at 43 ("COMES NOW, the State of Florida, by and through the undersigned counsel, and moves this Court to set aside and quash the warrant for arrest in rem issued against the State of Florida at the request of Plaintiffs herein . . ."). The order to show cause did not alter the fact that the process resisted by the State on Eleventh Amendment grounds was directed only at state officials.

> tion of the Fourteenth Amendment to the Constitution of the United States." Record 472.

Thus from the outset, Treasure Salvors has asserted that state officials do not have valid statutory authority to hold the property at issue.

In *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, this Court held that the actions of a federal official in withholding the delivery of goods pursuant to his interpretation of a disputed provision of a contract constituted at most a tortious deprivation of property. The proper remedy for the plaintiff was not an action in district court to compel delivery, but a suit for breach of contract in the Court of Claims. Actions of the Government official pursuant to legitimate contractual authority were neither ultra vires nor unconstitutional.

From the outset of the proceedings at issue here, the State of Florida has advanced the contracts that it executed with Treasure Salvors as a defense to the federal court's attempt to secure possession of the artifacts held by the named state officials. It is noteworthy, however, that the State has never argued that the contracts conferred upon the State a right of ownership in the artifacts; the contracts simply "determined the rights and obligations of the contracting parties . . . ." App. 44. The State has argued that the contracts are valid and "in no way affected" by the decision of this Court in *United States* v. *Florida*, 420 U. S. 531. App. 44.[31]

We are not called upon in this case to determine "the rights and obligations" of two parties to a contract. The issue presented is whether state officials had authority to refuse to surrender possession of the artifacts to the District Court. The salvage contracts are not relevant to that question unless they provide a basis upon which the officials may claim a right to withhold possession of the property. Unless the contracts determine rights of the parties to the property, they are collateral to the issue before us.

---

[31] In this Court the State has asserted that the issue on the merits involves a determination of the validity of the contracts. See *post*, at 712, n. 9. But the State has not identified any language in the contracts that provides even a colorable basis for a claim that the State has an ownership interest in the artifacts.

It is apparent that the State does not have even a colorable claim to the artifacts pursuant to these contracts. The contracts did not purport to transfer ownership of any artifacts to the State; they permitted Treasure Salvors "to conduct underwater salvage from and upon certain submerged sovereignty lands of and belonging to the State of Florida," *id.*, at 20–21, "for the purpose of salvaging abandoned vessels or the remains thereof . . . *which abandoned material is the property of the State of Florida.*" *Id.*, at 22 (emphasis added). The contracts provided for the performance of services on property that was believed to belong *in toto* to the State of Florida, in exchange for which the State agreed to "award to the Salvager seventy-five percent (75%) of the total appraised value of all material recovered . . . ." *Id.*, at 33. The State did not "yield" its claim to 75% of the artifacts in order to receive an undisputed right to the remaining 25%; the State agreed to pay Treasure Salvors the equivalent of 75% of the proceeds in compensation for the difficult and expensive work undertaken by Treasure Salvors in retrieving from the floor of the ocean property that was believed to belong to the State.

The salvage contracts might well provide a basis for a claim to the property by Treasure Salvors; for the contracts did purport to transfer a portion of the artifacts *from* the State to Treasure Salvors in compensation for the latter's services. Treasure Salvors does claim a right to ownership, but based entirely on the fact that it was the finder of abandoned property and therefore entitled to the property independently of the contracts.[32] Thus neither party's rights to ownership is affected in any way by the salvage contracts; whether the contracts are valid or not, they provide no authority for the refusal of state officials to surrender possession of the artifacts.

The authority of state officials to claim the artifacts was derived solely from Fla. Stat. §267.061(1)(b) (1974), which provided:

> "It is further declared to be the public policy of the state that all treasure trove, artifacts and such objects having intrinsic or historical and archaeological value *which have been abandoned on state-owned lands or state-owned sovereignty submerged lands* shall belong to the state with the title thereto vested in the division of archives, history and records management of the department of state for the purpose of administration and protection." (Emphasis added.)

This Court has determined, however, that the *Atocha* was not found on "state-owned sovereignty submerged lands." Rather, it was discovered on the Outer Continental Shelf of the United States, beneath international waters.[33]

---

[32] This case is thus unlike *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, in which the plaintiff asserted a right to the property pursuant to the very contract that it contended the Government official had breached without authority. Treasure Salvors claims ownership of the res on the ground that the property was abandoned by the former owner, and discovered by Treasure Salvors, on the Continental Shelf of the United States in international waters. See n. 8, *supra*.

[33] In this Court the State has advanced the argument that its boundaries for purposes of rightful ownership of sunken ships extend further than its boundaries for purposes of ownership of mineral resources. This argument was not raised in the petition for certiorari, is foreclosed by our prior determination of the State's boundaries, see n. 5, *supra*, and is refuted by the State's own conduct in this case. The State has never attempted to claim ownership of the property that Treasure Salvors has continued to recover since the expiration of the contracts. Given the State's vigorous de-

No statutory provision has been advanced that even arguably would authorize officials of the Division of Archives to retain the property at issue. Throughout this litigation, the State has relied solely on the contracts that it executed with Treasure Salvors as a defense to the federal court's process; those contracts were predicated entirely on a state statute that on its face is inapplicable in this case.[34] Actions of state officials in holding property on the assumption that it was found on state land and *for that reason* belongs to the State—when it is undisputed that the property was *not* found on state land—is beyond the authority of any reasonable reading of any statute that has been cited to us by the State.[35]

As recognized in *Larson*, "action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the

---

fense of the relatively few artifacts at issue in this case, it is difficult to imagine that the State idly would permit Treasure Salvors to pirate other treasure that rightfully belonged to the State.

[34] The fact that the contracts were executed on the basis of a mistaken understanding concerning the ownership of the *Atocha* cannot, of course, provide Florida with a colorable claim of ownership. For if the mistake had not occurred, it would have been apparent from the outset that Treasure Salvors had no reason to enter into a contract with Florida or any other stranger to the transaction. The State of Florida has never contended that it would benefit from a reformation of the contracts; Treasure Salvors' position does not depend on any change in the terms of the contracts. The Eleventh Amendment analysis in this case does not require any consideration of the doctrine of mistake.

[35] Although the State in this case relies only on the disputed contracts—and not on any statutory provision—we note that Fla. Stat. § 267.061(2)(a) (1981) provides generally that it is the responsibility of the Division of Archives to "[l]ocate, acquire, protect, preserve, and promote the location, acquisition, and preservation of historic sites and properties, buildings, artifacts, treasure trove, and objects of antiquity which have scientific or historical value or are of interest to the public, including, but not limited to, monuments, memorials, fossil deposits, Indian habitations, ceremonial sites, abandoned settlements, caves, sunken or abandoned ships, or any part thereof." Surely this section does not authorize state officials, however, to seize and hold historical artifacts at will wherever they are found.

plaintiff's property)" that is beyond the officer's statutory authority is not action of the sovereign, 337 U. S., at 701; a suit for specific relief against the officer is not barred by the Eleventh Amendment. This conclusion follows inevitably from *Ex parte Young*. If conduct of a state officer taken pursuant to an unconstitutional state statute is deemed to be unauthorized and may be challenged in federal court, conduct undertaken without any authority whatever is also not entitled to Eleventh Amendment immunity.

If a statute of the State of Florida were to authorize state officials to hold artifacts in circumstances such as those presented in this case, a substantial constitutional question would be presented. In essence, the State would have authorized state officials to retain property regardless of the manner in which it was acquired, with no duty to provide compensation for a public taking. If the Constitution provided no protection against such unbridled authority, all property rights would exist only at the whim of the sovereign.

Thus, since the state officials do not have a colorable claim to possession of the artifacts, they may not invoke the Eleventh Amendment to block execution of the warrant of arrest. Of course, the warrant itself merely secures possession of the property; its execution does not finally adjudicate the State's right to the artifacts. See *Tindal* v. *Wesley*, 167 U. S., at 223. In ruling that the Eleventh Amendment does not bar execution of the warrant, we need not decide the extent to which a federal district court exercising admiralty *in rem* jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns that did not appear and voluntarily assert any claim that they had to the res.

C

Finally, it is clear that the relief sought in this case is consistent with the principles of *Edelman* v. *Jordan*, 415 U. S.

651. The arrest warrant sought possession of specific property. It did not seek any attachment of state funds and would impose no burden on the state treasury.

This case is quite different from *In re New York (I)*, 256 U. S. 490, and *In re New York (II)*, 256 U. S. 503, relied on by the State. In *In re New York (I)*, the plaintiff brought an action in federal court to recover damages caused by canal boats chartered by the State of New York. Pursuant to admiralty practice, the action was brought *in rem* against the vessels themselves. The owner of the vessels answered the complaint, contending that the action should be directed against the Superintendent of Public Works of the State of New York. The District Court agreed and ordered the Superintendent to appear and answer; in the event that he could not be found the court directed that "the goods and chattels of the State of New York used and controlled by him" should be attached. 256 U. S., at 496.

The Attorney General of the State appeared on behalf of the Superintendent and asserted the Eleventh Amendment as a defense to the action. This Court held that the District Court lacked jurisdiction to proceed against the Superintendent. The Court noted that "the proceedings against which prohibition is here asked have no element of a proceeding *in rem*, and are in the nature of an action *in personam* against Mr. Walsh, not individually, but in his capacity as Superintendent of Public Works of the State of New York," *id.*, at 501; moreover, "[t]here is no suggestion that the Superintendent was or is acting under color of an unconstitutional law, or otherwise than in the due course of his duty under the constitution and laws of the State of New York." *Id.*, at 502. The Court concluded: "In the fullest sense, therefore, the proceedings are shown by the entire record to be in their nature and effect suits brought by individuals against the State of New York, and therefore—since no consent has been given—beyond the jurisdiction of the courts of the United States." *Ibid.*

In *In re New York (II)*, the plaintiff filed an action in admiralty to recover damages caused by the negligent operation of a canal boat *owned* by the State of New York. The action was brought *in rem* and the vessel was arrested. This Court held, as it had in *In re New York (I)*, that the federal court lacked jurisdiction to adjudicate the claim. In broad language urged upon us here, the Court stated that property owned by a State and employed solely for governmental uses was exempt from seizure by admiralty process *in rem*. 256 U. S., at 511. The force of the holding in *In re New York (II)*, however, is that an action—otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State. Otherwise, the Eleventh Amendment could easily be circumvented; an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*.

In these cases the plaintiff did not claim an ownership interest in the vessels and did not question the State's assertion of ownership. The sole purpose of the attempted arrests was to enable the court to acquire jurisdiction over a damages claim that was otherwise barred by the Eleventh Amendment. In this case Treasure Salvors is not asserting a claim for damages against either the State of Florida or its officials. The present action is not an *in personam* action brought to recover damages from the State. The relief sought is not barred by the Eleventh Amendment.

IV

The Eleventh Amendment thus did not bar the process issued by the District Court to secure possession of artifacts of the *Atocha* held by the named state officials. The proper resolution of this issue, however, does not require—or permit—a determination of the State's ownership of the artifacts.

This resolution of the immunity issue is not consistent with the disposition of the Court of Appeals. The court properly held that the Eleventh Amendment did not bar execution of the warrant of arrest; in making that determination, however, the Court of Appeals improperly adjudicated the State's right to the artifacts. While such an adjudication would be justified if the State voluntarily advanced a claim to the artifacts, it may not be justified as part of the Eleventh Amendment analysis, the only issue before us.

For these reasons, the judgment of the Court of Appeals must be affirmed in part and reversed in part. To the extent that the court held that the Eleventh Amendment did not prohibit an execution of the warrant and transfer of the artifacts to Treasure Salvors, its judgment is affirmed. To the extent that the court determined the State's ownership of the artifacts as part of its Eleventh Amendment analysis, its judgment is reversed.

It is so ordered.

JUSTICE BRENNAN, concurring in the judgment in part and dissenting in part.

I agree with the plurality that the Eleventh Amendment prohibited neither an execution of the warrant nor a transfer to respondents of the artifacts at issue in this case. See *ante*, at 699 and this page. My rationale for this conclusion differs from the plurality's, however. Both respondents are corporations organized under the laws of the State of Florida. Thus this suit is not "commenced or prosecuted against one of the United States by citizens of *another* State." U. S. Const., Amdt. 11 (emphasis added). The plurality asserts that this constitutional provision "long has been held to govern" "actions brought against a State by *its own* citizens." *Ante*, at 683, n. 17 (emphasis added), citing *Hans* v. *Louisiana*, 134 U. S. 1 (1890). I have long taken the view that *Hans* did *not* rely upon the Eleventh Amendment, and that that Amendment does *not* bar federal court suits against a

State when brought by its own citizens. See *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279, 309–322 (1973) (dissenting opinion); *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974) (dissenting opinion). I adhere to this view, and I therefore believe that the Eleventh Amendment is wholly inapplicable in the present case.* To this extent, I am in agreement with the plurality's disposition.

I disagree, however, with the plurality's conclusion that the courts below erred when they "determined the State's ownership of the artifacts as part of [their] Eleventh Amendment analysis." *Ante*, at 700. The record before us plainly indicates that the State had a full opportunity to present its arguments respecting ownership of the artifacts at issue in this case when the action was in the District Court, and that that court held a full evidentiary hearing on the merits of these arguments. See *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel*, 459 F. Supp. 507, 521 (SD Fla. 1978); 621 F. 2d 1340, 1344 (CA5 1980). The State's arguments were rejected in the District Court, and that rejection was affirmed by the Court of Appeals. The plurality today appears to agree with the courts below that the arguments available to the State on the merits were, and are, insubstantial. *Ante*, at 694–697. "No statutory provision has been advanced that *even arguably would authorize* officials of the Division of Archives to retain the property at issue," *ante*, at 696 (emphasis added), and "the State *does not have even a colorable claim to the artifacts*" pursuant to its contracts with respondents, *ante*, at 694 (emphasis added). Given such legal conclusions, I fail to see any need to reverse the determination by the courts below of the State's ownership, as the plurality prescribes, *ante*, at 700.

---

*For this reason, I cannot agree with footnote 17 of the plurality's opinion. To the extent, however, that the plurality concludes that the judgment of the Court of Appeals should be affirmed because the State of Florida does not have even a colorable claim to the artifacts, I agree with its opinion.

I do understand that the plurality does *not remand* this action for a determination of the State's ownership, and rather simply reverses the judgment below on this point. But the fact remains that the courts below have already determined the merits of the State's claim: Even if they were incorrect to make that determination at the time that they did, why should that fact *invalidate* that determination? Why should the State now get a second bite at the apple?

In sum, I would affirm the judgment of the Court of Appeals in its entirety.

JUSTICE WHITE, with whom JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, concurring in the judgment in part and dissenting in part.

The essence of this litigation is a dispute between the State of Florida and one of its citizens over ownership of treasure. The Eleventh Amendment precludes federal courts from entertaining such suits unless the State agrees to waive its Eleventh Amendment immunity. Because it is the State itself which purports to own the controverted treasure, and because the very nature of this suit, as defined in the complaint and recognized by both the District Court and Court of Appeals, is to determine the State's title to such property, this is not a case subject to the doctrine of *Ex parte Young*, 209 U. S. 123 (1908). In short, this is a suit against the State of Florida, without its permission. Moreover, were the suit to be characterized as one against only state agents, I would find that contract with the State provided a colorable basis upon which the agents could hold the property.

The Court of Appeals, like the District Court, thought that the jurisdictional issue raised by the State merged with a determination on the merits of the validity of the State's claim to the property. The appellate court believed that it had "jurisdiction to decide jurisdiction" and could therefore determine who owned the artifacts in order to ascertain whether the suit was, in fact, an action against the State.

By holding that "[t]he court did not have power . . . to adjudicate the State's interest in the property without the State's consent," *ante*, at 682, the Court properly rejects this novel conception of the Eleventh Amendment.* The appellate court's approach to the jurisdictional issue is not consistent with our prior cases; it incorrectly assumes that a federal court may adjudicate a State's right to ownership of specific property within the possession of state officials without the State's consent. The approach is unsatisfactory because, as Judge Rubin noted in dissent, it "is equivalent to asserting that suits against a state are permitted by the eleventh amendment if the result is that the state loses." 621 F. 2d 1340, 1351 (CA5 1980). Although disagreeing with the Court of Appeals' Eleventh Amendment holding, the plurality nevertheless proceeds to conclude that the "State does not have even a colorable claim to the artifacts pursuant to [its] contracts" with respondents, *ante*, at 694, and that the state officials "have [no] colorable claim to possession of the artifacts." *Ante*, at 697. This for all practical purposes adjudicates the State's title, thus repeating the Eleventh Amendment error of the Court of Appeals.

JUSTICE STEVENS' plurality opinion rests precariously on two transparent fictions. First, it indulges in the fantasy that the enforcement of process by arrest of the res is somehow divorced from the action to determine the State's claim to the res—a position contradicted by our own most apposite precedents, the two *In re New York* cases, 256 U. S. 490 (1921), and 256 U. S. 503 (1921). That dubious proposition is parlayed by a second fiction—that Florida's Eleventh Amendment freedom from suit is meaningfully safeguarded by not formally rejecting the State's claim to the artifacts although federal agents may seize the contested property and federal courts may adjudicate its title. Neither of these novel propositions follows from *Ex parte Young, supra.* The rule of *Ex parte Young* is premised on the axiom that state officials cannot evade responsibility when their conduct "comes into conflict with the superior authority of [the] Constitution." *Id.*, at 159. Today, the plurality dilutes the probative force behind that cornerstone decision by extrapolating it to allow federal courts to decide a property dispute between a State and one of its citizens, without the State's consent. For these reasons, as explained below, I dissent in part.

---

*I therefore concur in the judgment of the Court only insofar as it reverses the Court of Appeals' determination of the State's ownership of the artifacts. On this point, all Members of the Court, except JUSTICE BRENNAN, are in agreement.

I

The Suit Is Against the State

The case is directly traceable to Treasure Salvors' filing of a motion in District Court for an order commanding the United States Marshal to arrest and take custody of the contested artifacts and to bring them within the jurisdiction of the court. Record 318. The roots of the case, however, rest in the earlier *in rem* action brought by Treasure Salvors to establish its title to the wreck and its bounty. The District Court held that possession and title rested with Treasure Salvors. *Treasure Salvors, Inc.* v. *Abandoned Sailing Vessel,* 408 F. Supp. 907, 911 (SD Fla. 1976). The Court of Appeals affirmed Treasure Salvors' ownership of all objects within the District Court's jurisdiction and to those objects outside its territory with respect to the United States. *Treasure Salvors, Inc.* v. *Unidentified Wrecked and Abandoned Sailing Vessel,* 569 F. 2d 330 (CA5 1978) *(Treasure Salvors I).*

Treasure Salvors' subsequent request for an arrest warrant was predicated on this decision.[1] The warrant was to issue because it had already been decided that Treasure Salvors had "sole title and right to possession of the Defendant vessel." App. 13. Notwithstanding the Court of Appeals' limitation of its opinion to artifacts within the District Court's jurisdiction and to rights in the treasure asserted by the United States, Treasure Salvors sought enforcement of the judgment against the State of Florida. It did so on grounds that this Court's decision in *United States* v. *Florida*, 420 U. S. 521 (1975), removed Florida's right to the artifacts, and that Florida was privy to and bound by *Treasure Salvors I*.

---

[1] "[T]he plaintiffs . . . pursuant to the Final Judgment rendered by this Court February 19, 1976 and the Appellate Opinion rendered by the United States Court of Appeals for the Fifth Circuit No. 76-2151, March

> "Inasmuch as the State of Florida [and its officers] were privy to this litigation, it is clear that [the district court] confirmed to the Plaintiffs' . . . title to and right to immediate and sole possession of the vessel . . . together with all her . . . cargo, wherever the same may be found." App. 18 (emphasis deleted).

In short, Treasure Salvors requested seizure of the artifacts in order to enforce an earlier judgment against the State. This is reason enough to conclude that the suit, and the accompanying warrant for arrest of the articles, were actions invoking federal judicial power against the State and not merely its agents.

But even if this were not so, subsequent events reveal that the case is one against the State. After the State filed a motion to quash the warrant, Treasure Salvors filed a supplemental complaint requesting that the contract be held void; it also requested that the District Court rule "[t]hat the State has no right, title or interest" in any portions of the *Atocha* in its possession. Record 371. The District Court then entered an order to show cause addressed directly to the State

---

13, 1978, move this Court for an Order commanding the United States Marshal to arrest and take custody of those portions of the Plaintiff's vessel now being held by L. Ross Morrell or James McBeth or being held under their custody, care or control." App. 11.

of Florida. App. 63. The State then argued that the Eleventh Amendment barred the suit. After rejecting all of the State's arguments, the District Court ordered that Treasure Salvors "have full right and title to articles arrested and that they are entitled to possession." *Id.*, at 85. The Court of Appeals affirmed this judgment.

I find the inescapable conclusion to be that this suit, as filed, litigated, and decided, was an action to determine the title of the State of Florida to the artifacts.[2] A suit of this type is at the heart of the Eleventh Amendment immunity.

The line of cases culminating in *Ex parte Young*, 209 U. S. 123 (1908), are not to the contrary. In both *United States* v. *Lee*, 106 U. S. 196 (1882), and *Tindal* v. *Wesley*, 167 U. S. 204 (1897), the suits were against individual agents and did not purport to conclude the rights of the Government. As the Court correctly notes, *Tindal* made plain that a judgment awarding possession to the plaintiff would not subsequently bind the Government. Here the entire point of the *in rem* proceeding is to apply the judgment in *Treasure Salvors I* to erase the State's claim to the treasure. This is the only basis for issuance of the arrest warrant; it was the relief expressly requested by the respondents, and the relief subsequently granted by the District Court and the Court of Appeals.

My position is supported by the precedents closest to the instant case: the *In re New York* cases, 256 U. S. 490 (1921), and 256 U. S. 503 (1921). The first *In re New York* decision arose from an *in rem* libel against the private owners of tugboats that had been at fault in collisions while chartered and operated by the State. The owners sought to bring in the Superintendent of Public Works who had entered into the charters on the State's behalf. The issue before this Court was whether the State could, without its consent, be impleaded in admiralty process in an action against private parties. The Court held that the "proceedings against which prohibition is here asked," *i. e.*, the attempt to implead the State, "have no element of a proceeding *in rem* and are in the nature of an action *in personam*" against a state officer. The purpose of this distinction was not to suggest that *in rem* actions could be brought against the State, or even that the original libel was not a true *in rem* cause, but rather to highlight that impleading of a state official, no less than a direct action against the official, constituted a suit against a state officer in his "official capacity" and might require satisfaction out of the property of New York. 256 U. S., at 501.

---

[2] The fact that the District Court did not issue its arrest warrant in response to Treasure Salvors' amended complaint is of little significance. It is the complaint which defines the nature of an action, and once accepted, an amended complaint replaces the original. Moreover, the adjudication of title either reflects that the ownership claim followed from the original complaint or constituted action upon the amended complaint.

The second *In re New York* decision, a sovereign immunity case, made clear that a State's immunity extended to admiralty actions *in rem*.

> "The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem*, applies with even greater force to exempt public property of a State used and employed for public and governmental purposes." 256 U. S., at 511.

The plurality's reading of *In re New York (II)* is that an action "otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State." *Ante*, at 699.[3] Nothing in the language of Justice Pitney's opinion supports this interpretation. Moreover, the libel brought before the Court in that case was a true *in rem* action; an action in admiralty to recover damages caused by a ship is a classic *in rem* action, although after the owners of the vessel are identified the libel often will be amended to include an *in personam* claim as well. G. Gilmore & C. Black, Law of Admiralty 498 (2d ed. 1975) (Gilmore & Black). Therefore, *In re New York (II)* is as "true" an *in rem* action as the instant case.

---

[3] The plurality confuses the matter further by treating the cases as bearing on the question of whether a burden is imposed on the state treasury. The *In re New York* cases pertain instead to the initial issue of whether the action is against the State.

The grounds of similarity between the cases are clear: in both cases *in rem* libels were filed and process by arrest was requested; in both suits the State by its Attorney General responded and indicated to the District Court that the property to be arrested was in the possession and ownership of the State, and therefore immune from seizure and attachment. In both cases, the District Court overruled the suggestion and awarded process *in rem*, authorizing the arrest of the res. When the seizure of the *Queen City* finally reached this forum, the Court stated that the property was exempt from seizure by admiralty process *in rem*.[4] The plurality's distinction aside, the cases can be distinguished on but a single relevant point: the fact that ownership of the res is contested here. That, of course, is the grounds on which the Court of

---

[4] *In re New York (II)* was decided on straight sovereign immunity grounds: "[T]he record—aside from whether a suit in admiralty brought by private parties through process *in rem* against property owned by a State is not in effect a suit against the State, barred by the general principle applied in *Ex parte New York, No. 1*, No. 25, Original—presents the question whether the proceeding can be based upon the seizure of property owned by a State and used and employed solely for its governmental uses and purposes." The Court went on to decide the vessel was immune from admiralty process, based upon "the law of nations" and "general grounds of comity and policy." 256 U. S., at 510.

In re New York (II)'s resolution on sovereign immunity grounds has several implications. First, as with other sovereign immunity decisions, it is direct support for determining what constitutes a suit against the State. *Ante*, at 686, n. 21. Cf. *Tindal* v. *Wesley*, 167 U. S. 204, 213 (1897). Second, it undercuts the plurality's analysis that the case merely stops roundabout circumvention of *In re New York (I)* through "first attaching property that belonged to the State and then proceeding *in rem*." *Ante*, at 699. As the above quoted passage indicates, the *In re New York (II)* Court did not need to go so far in order to find the suit barred.

Appeals decided the case—a resolution which the plurality apparently rejects.

In re New York (I) indicates that the Eleventh Amendment will bar a suit that has the effect of proceeding against a state officer and involving the State's property. *In re New York (II)* squarely stands for the proposition that sovereign immunity bars process against a res in the hands of state officers. This is true even though an *in rem* action strictly proceeds against the vessel, and the owner of the vessel or artifacts is not an indispensable party. Significantly, *In re New York (II)* did not distinguish between the service of process to arrest the res and the thrust of the libel itself to determine the rights in the vessel. I follow that course in this case, and refuse to sever the attempt to arrest the artifacts from the attempt to decide their ownership.

The *In re New York* cases are particularly forceful because they reflect the special concern in admiralty that maritime property of the sovereign is not to be seized. This principle dates back to the English[5] and has not been significantly altered in this country.[6] The *In re New York* cases are but the most apposite examples of the line of cases concerning *in rem* actions brought against vessels in which an official of the State, the Federal Government, or a foreign government has asserted ownership of the res. The Court's consistent interpretation of the respective but related immunity doctrines pertaining to such vessels has been, upon proper presentation that the sovereign entity claims ownership of a res in its possession, to dismiss the suit or modify the judgment accordingly.[7]

---

[5] Under English law, no warrant for arrest will issue against any vessel in the actual service of a recognized foreign government. Significantly, this is so even if the suit itself is not barred. See, *e. g.*, *The Messicano*, 32 T. L. R. 519 (1916). Where plaintiff sues *in rem* for possession "the writ will be dismissed, if a foreign recognized government claims the right to possession and is in the actual possession of the vessel, regardless of whether possession was rightfully or wrongfully obtained." Riesenfeld, Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine, 25 Minn. L. Rev. 1, 25 (1940). In *The Parlement Belge*, 5 P. D. 197, 220 (1880), the "leading authority" in England, it was held that "[i]f the remedy sought by an action in rem against public property is, as we think it is, an indirect mode of exercising the authority of the Court against the owner of the property, then the attempt to exercise such an authority is an attempt inconsistent with the independence and equality of the state which is represented by such owner." Moreover, after a ship was declared by the foreign sovereign "to be in his possession as sovereign and to be a public vessel of the state," it was "very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct." *Id.*, at 219.

Finally, the allowance of an *in rem* suit against arguably state-owned maritime property rests on the "personification" theory of the res—that the action runs against the *Atocha* and not the State of Florida. This distinction between *in rem* and *in personam* actions has been decisively rejected. As the fiction of the personality of the ship declined, Gilmore & Black 615, 804–805, *in rem* actions were given *in personam* effect, and *in personam* judgments barred subsequent *in rem* actions. *Id.*, at 802, 613–614. See, *e. g.*, *Burns Bros.* v. *Central R. Co. of New Jersey*, 202 F. 2d 910 (CA2 1953) (L. Hand, J.). In short, under long-established admiralty law, arrest of sovereign maritime property is not tolerated, and an *in rem* suit directed at government property is an action against the State.

---

[6] For early cases, see *United States* v. *Peters*, 3 Dall. 121 (1795); *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812); *L'Invincible*, 1 Wheat. 238 (1816); *The Santissima Trinidad*, 7 Wheat. 283 (1822). In *The Siren*, 7 Wall. 152 (1869), the Court allowed a claim against the proceeds of the vessel when sold, but stressed that no claim could be enforced while the Government owned the vessel. In *The Western Maid*, 257 U. S. 419 (1922), the Court, per Justice Holmes, went further and refused to allow a claim against a Government-owned vessel as enforceable either during Government ownership or thereafter. Shortly thereafter, sovereign immunity was expanded to embrace ships engaged solely in commerce. *Berizzi Bros. Co.* v. *S.S. Pesaro*, 271 U. S. 562 (1926).

[7] See Gilmore & Black 606–613. Only when a vessel is not in the sovereign's possession, is there controversy over the proper means by which the foreign government may assert its ownership. See *Compania Espanola de Navegacion Maritima* v. *The Navemar*, 303 U. S. 68 (1938).

II

Holding of the Treasure by State Officials Was Not Ultra Vires

Alternatively, if the arrest of the artifacts was not, without more, a suit against the State, the action was nevertheless against state agents acting within their authority and holding property for the State under a colorable claim of right. It is settled that the Eleventh Amendment bars actions which are in effect against the State, even though the State is not the nominal party. *Louisiana* v. *Jumel,* 107 U. S. 711, 719–723, 727–728 (1883).

Leaving aside other possible bases by which the state officials had authority to refuse to surrender possession of the artifacts, I address the salvage contracts entered into between the State and Treasure Salvors. Under the contracts, which were renewed annually, Treasure Salvors was to conduct underwater salvage on Florida lands. By the terms of the contract, Treasure Salvors received 75% of the artifacts recovered. The State was to retain 25% of the representative artifacts. This arrangement was renewed on three occasions, the last contract being entered into on December 3, 1974. It was during that contract's duration that we decided *United States* v. *Florida,* 420 U. S. 531 (1975), which established Florida's boundaries along lines which placed the *Atocha* in international waters.

If it were not for this decision, it would be beyond cavil that Florida owned one-fourth of the artifacts pursuant to its ownership of the submerged land on which the *Atocha* rested as well as the contracts. It is also beyond reasonable dispute that the Eleventh Amendment bars a federal court from deciding the rights and obligations of a State in a contract unless the State consents. *Larson* v. *Domestic & Foreign*

Commerce Corp., 337 U. S. 682 (1949). The plurality does not take issue with this proposition.[8]

The plurality treats this as a different case for two reasons. The first is that the State has never, in so many words, argued that the contracts conferred upon the State a right of ownership in the artifacts. *Ante*, at 693. While this may be true in the sense that Florida believed that it owned the artifacts even aside from the contracts, it is not true that Florida has not asserted that the contracts create an independent right to the treasure. Florida has repeatedly and expressly made precisely such a claim.[9]

The plurality's second argument is that the "State does not have even a colorable claim to the artifacts pursuant to these contracts." *Ante*, at 694. I disagree with this conclusion. The wording of the contract is reasonably interpretable as providing for a division of the recovered treasure. The intention of the parties upon the making of the contract, of course, governs the interpretation of the instrument. If *United States* v. *Florida*, *supra*, had placed the *Atocha* within Florida waters, it could not reasonably be argued that the contract did not constitute a valid basis for the State's claim to 25% of the artifacts. Both Treasure Salvors and the State entered into the contracts on the assumption that the *Atocha* rested in Florida waters. As it happened, the *Florida* decision upset that mutual assumption. This does not, however, inexorably mean that the contracts are so invalid as to render possession of the artifacts ultra vires.[10] Admiralty law may provide that such a mistake is not grounds for rescission of fully performed contracts in these circumstances.[11] The plurality's contention that the language of the contracts does not purport to transfer artifacts from Treasure Salvors to the State utterly ignores the concept of mistake. The notion of mistake would be read out of contract law if courts expected a contract, written under mistaken assumptions, to read as if the mistake had not occurred.

---

[8] "In *Larson* . . . this Court held that the actions of a federal official in withholding the delivery of goods pursuant to his interpretation of a disputed provision of a contract constituted at most a tortious deprivation of property. . . . Actions of the Government official pursuant to legitimate contractual authority were neither ultra vires nor unconstitutional." *Ante*, at 693.

[9] "At issue in the present case is both a contract and property right of the State of Florida to the artifacts previously in its possession . . . ." Brief for Petitioner 32; "The issue on the merits was whether the State had property rights to artifacts in its Archives—that is, whether the contract to which the state was a party was valid." *Id.*, at 60. "The State of Florida has not claimed a lien on the artifacts; it has claimed ownership—through fully executed contracts." Reply Brief for Petitioner 16–17. "The contract alone determined the rights and obligations of the contracting parties and was in no way affected by United States v. Florida." State's Motion to Quash Warrant for Arrest in Rem, App. 44.

Whether the contracts are ultimately valid is beside the point. The existence of a colorable contractual claim to the artifacts, the presence of statutory authority for the State to enter into the contracts, and the ability to raise a mistake-of-law defense not rejectible on its face, is all that need be shown to indicate that possession of the artifacts by the state officials was not ultra vires. Although it would be too much to suggest that our Eleventh Amendment is crystal clear in all respects, this is, at least, the teaching of our most recent cases.

---

[10] The plurality also suggests that the contracts "were predicated entirely on a state statute that on its face is inapplicable in this case." *Ante*, at 696. This no more than restates the plurality's characterization of the contracts. But it does highlight that the contracts' validity is called into question only by a mistaken assumption of law—the statute's "inapplica[bility]" after *United States* v. *Florida*, 420 U. S. 531 (1975).

[11] The inherent uncertainty in contracts for salvage has led admiralty courts to find few reasons that would justify reformation of a contract. See *The Elfrida*, 172 U. S. 186, 196 (1898) ("We do not think that a salvage contract should be sustained as an exception to the general rule, but rather that it should, *prima facie*, be enforced, and that it belongs to the defendant to establish the exception"). Gilmore & Black 582 ("Whether the gamble turns well or badly for the salvor, the 'no cure no pay' contract is everywhere recognized as enforceable, absent such invalidating causes as fraud and duress").

Larson v. *Domestic & Foreign Commerce Corp.*, *supra*, is most directly apposite. There a private corporation brought suit in Federal District Court against the Administrator of the War Assets Administration, an agency of the United States Government, in his official capacity. The claim was that the Administration had sold certain surplus coal to the plaintiff, but had refused to deliver it and had made a new contract to sell it to others. A declaration was sought that the first contract was valid, the second contract invalid, and appropriate injunctive relief was requested. The Court held that the suit was against the United States and the District Court was therefore without jurisdiction to entertain it. The Court's decision rested on the Administrator's statutory authority to enter a binding contract to sell coal, and the absence of a claim that the failure to deliver the coal constituted a taking of private property. The Court refused to pass upon the validity of the contract itself, *i. e.*, whether the initial contract with the plaintiff was breached.[12]

Larson established that where the officer's actions are limited by statute, actions beyond those limitations are to be considered individual and not sovereign actions. "The officer is not doing the business which the sovereign has empowered him to do . . . . His actions are *ultra vires* his authority and therefore may be made the object of specific relief." 337 U. S., at 689. Similarly, unconstitutional actions by state officers could not be considered the work of the sovereign and were not protected by the shield of sovereign immunity. The *Larson* Court rejected, however, a third proposed category of official actions amenable to suit.[13] It was urged upon the Court that if an "officer . . . wrongly takes or holds specific property to which the plaintiff has title," then his action is illegal and the officer may be sued. The Court found the theory erroneous:

---

[12] The plurality's attempt to distinguish *Larson* is puzzling. It notes that while the plaintiff in *Larson* asserted a right to the property pursuant to the very contract it contended the Government official had breached, here Treasure Salvors claims ownership on grounds entirely independent of the contracts. This is a distinction without meaning: it is the State's claim to the property which is significant; the basis for Treasure Salvors' claim is quite beside the point. The relevant comparison is that the federal official in *Larson* was arguably without authority to enter a contract to sell coal that he had already sold just as the State was arguably without authority to enter a contract respecting salvage on lands outside its waters.

---

[13] The plurality acknowledges that *Larson* clarified the understanding of earlier cases such as *Tindal* v. *Wesley*, 167 U. S. 204 (1897), and *United States* v. *Lee*, 106 U. S. 196 (1882). Dicta in both *Tindal* and *Lee* are cited by the Court to suggest that a federal court may adjudicate the validity of a title in order to determine whether the case is a suit against the State. It is precisely this aspect of the cases that *Larson* "clarified." A court may go only so far as to ascertain whether an official has a colorable basis for his action—to go farther is to, in effect, try the case on the jurisdictional issue and "is equivalent to asserting that suits against the state are permitted by the eleventh amendment if the result is that the state loses." 621 F. 2d 1340, 1351 (CA5 1980) (Rubin, J., dissenting).

The inapplicability of *United States* v. *Lee* was made clear in *Malone* v. *Bowdoin*, 369 U. S. 643 (1962), a case involving an attempt to eject a Forest Service Officer from land occupied by him solely in his official capacity under a claim of title in the United States. The plaintiffs argued they were the rightful owners of the land. The Court held that the suit was an impermissible action against the United States, and stated:

> "While not expressly overruling *United States* v. *Lee, supra*, the Court in *Larson* limited that decision in such a way as to make it inapplicable to the case before us. Pointing out that at the time of the *Lee* decision there was no remedy by which the plaintiff could have recovered compensation for the taking of his land, the Court interpreted *Lee* as simply 'a specific application of the constitutional exception to the doctrine of sovereign immunity.' 337 U. S. at 696. So construed, the *Lee* case has continuing validity only 'where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation.' *Id.*, at 697." *Id.*, at 647–648.

An *in rem* admiralty action, like an ejectment suit, is an action to determine title to property, and, here, like in *Bowdoin*, there is no claim of an unconstitutional taking without adequate compensation. Indeed, Treasure Salvors may be able to bring an *in personam* action in state court to determine ownership of the treasure.

> "The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True, it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign." *Id.*, at 693.

This is a *Larson* case. Florida entered into the contract pursuant to an indisputably valid state statute, Fla. Stat. §267.061(1)(b) (1974), providing title to treasure trove abandoned on state-owned submerged lands. The Court relies heavily, as it must, on the subsequent determination that the wreck of the *Atocha* was in international waters. This, of course, was not settled law at the time the contracts were entered into and executed. Before concluding that the state officials' exercise of rights under the contracts was ultra vires, it is necessary to reach the merits of the contract, and dispose of the mistake-of-law contention. Similarly, the scattershot reasoning of the District Court in refusing to honor the contract—characterization of the mistake as one of fact, treatment of the contract as void for coercion and lack of consideration—constitutes an adjudication of the merits of the contracts. *At the time the contracts were entered into and executed* they were not ultra vires or otherwise so plainly invalid as not to offer a colorable basis for possession of the artifacts.

It is significant that the analysis pursued by the plurality in this respect is little different from that of the Fifth Circuit in deciding the merits in order to ascertain jurisdiction over the matter. As indicated earlier, the plurality performs the task under a different rubric, but the result is equally objectionable. A colorable basis for the exercise of authority by state officials may not ultimately be a valid one, but it does serve to invoke the Eleventh Amendment. That is the lesson of *Larson* and we should adhere to it.

III

The plurality begins by stating that "[s]tripped of its procedural complexities and factual glamor, this case presents a narrow legal question." *Ante*, at 683. Be that as it may, the answer supplied by the plurality is anything but narrow. If the plurality means all that it says today, the consequences will be unfortunate. Given that all property of the State must be held by its officers, and assuming a jurisdictional basis, there is no item within state possession whose ownership cannot be made the subject of federal litigation by the expedient of arrest or attachment. The State must then defend on the merits: it must persuade a federal court that its officers were justified in holding the controverted property. We see today that this inquiry will be tantamount to deciding the question of title itself. Moreover, the State's immunity from suit is stripped away on land as well as sea: the plurality notes that the question presented would not be any different if the State merely resisted an attachment of property. *Ibid.*

The plurality hardly conceals its view of Florida's claim to the artifacts or the equities involved in this litigation. Yet the Eleventh Amendment teaches that a federal court has no right to offer its opinion on a local dispute between a State and its citizens unless the State consents. In sum, the disposition of this case can only be explained by "procedural complexities and factual glamor." If so, the decision has earned a fitting sobriquet: aberration.

MISSISSIPPI UNIVERSITY FOR WOMEN ET AL. *v.* HOGAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-406. Argued March 22, 1982—Decided July 1, 1982

Held: The policy of petitioner Mississippi University for Women (MUW), a state-supported university which has from its inception limited its enrollment to women, of denying otherwise qualified males (such as respondent) the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 723-733.

(a) The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg* v. *Feenstra*, 450 U. S. 455, 461; *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 273. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S. 142, 150. The test must be applied free of fixed notions concerning the roles and abilities of males and females. Pp. 723-727.

(b) The single-sex admissions policy of MUW's School of Nursing cannot be justified on the asserted ground that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. A State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. Rather than compensating for discriminatory barriers faced by women, MUW's policy tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. Moreover, the State has not shown that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men. Thus, the State has fallen far short of establishing the "exceedingly persuasive justification" needed to sustain the gender-based classification. Pp. 727-731.

(c) Nor can the exclusion of men from MUW's School of Nursing be justified on the basis of the language of § 901(a)(5) of Title IX of the Education Amendments of 1972, which exempts from § 901(a)'s general prohibition of gender discrimination in federally funded education programs the admissions policies of public institutions of undergraduate higher education "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex." It is not clear that, as argued by the State, Congress enacted the statute pursuant to its power granted by § 5 of the Fourteenth Amendment to enforce that Amendment, and thus placed a limitation upon the broad prohibitions of the Equal Protection Clause. Rather, Congress apparently intended, at most, to create an exemption from Title IX's requirements. In any event, Congress' power under § 5 "is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach* v. *Morgan*, 384 U. S. 641, 651, n. 10. Pp. 731–733.

646 F. 2d 1116 and 653 F. 2d 222, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C. J., *post*, p. 733, and BLACKMUN, J., *post*, p. 733, filed dissenting opinions. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 735.

Hunter M. Gholson argued the cause for petitioners. With him on the briefs were *Bill Allain*, Attorney General of Mississippi, and *Ed Davis Noble, Jr.*, Assistant Attorney General.

Wilbur O. Colom argued the cause for respondent. With him on the brief was *W. Wayne Drinkwater, Jr.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the narrow issue of whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment.

I

The facts are not in dispute. In 1884, the Mississippi Legislature created the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi, now the oldest state-supported all-female college in the United States. 1884 Miss. Gen. Laws, Ch. 30, § 6. The school, known today as Mississippi University for Women (MUW), has from its inception limited its enrollment to women.[1]

**Zona Fairbanks Hostetler, Suellen Terrill Keiner, Phyllis N. Segal, Marcia D. Greenberger*, and *Judith L. Lichtman* filed a brief for the National Women's Law Center et al. as *amici curiae* urging affirmance.

In 1971, MUW established a School of Nursing, initially offering a 2-year associate degree. Three years later, the school instituted a 4-year baccalaureate program in nursing and today also offers a graduate program. The School of Nursing has its own faculty and administrative officers and establishes its own criteria for admission.[2]

Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. Since 1974, he has worked as a nursing supervisor in a medical center in Columbus, the city in which MUW is located. In 1979, Hogan applied for admission to the MUW School of Nursing's baccalaureate program.[3] Although he was otherwise qualified, he was denied admission to the School of Nursing solely because of his sex. School officials informed him that he could audit the courses in which he was interested, but could not enroll for credit. Tr. 26.[4]

---

[1] The charter of MUW, basically unchanged since its founding, now provides:

"The purpose and aim of the Mississippi State College for Women is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework, and in such other industrial branches as experience, from time to time, shall suggest as necessary or proper to fit them for the practical affairs of life." Miss. Code Ann. § 37-117-3 (1972).

Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide "separate but equal" undergraduate institutions for males and females. Cf. *Vorchheimer* v. *School District of Philadelphia*, 532 F. 2d 880 (CA3 1975), aff'd by an equally divided Court, 430 U. S. 703 (1977).

[2] Record, Exhibit 1, 1980-1981 Bulletin of Mississippi University for Women 31-34, 212-229.

[3] With a baccalaureate degree, Hogan would be able to earn a higher salary and would be eligible to obtain specialized training as an anesthetist. Tr. 18.

Hogan filed an action in the United States District Court for the Northern District of Mississippi, claiming the single-sex admissions policy of MUW's School of Nursing violated the Equal Protection Clause of the Fourteenth Amendment. Hogan sought injunctive and declaratory relief, as well as compensatory damages.

Following a hearing, the District Court denied preliminary injunctive relief. App. to Pet. for Cert. A4. The court concluded that maintenance of MUW as a single-sex school bears a rational relationship to the State's legitimate interest "in providing the greatest practical range of educational opportunities for its female student population." *Id.*, at A3. Furthermore, the court stated, the admissions policy is not arbitrary because providing single-sex schools is consistent with a respected, though by no means universally accepted, educational theory that single-sex education affords unique benefits to students. *Ibid.* Stating that the case presented no issue of fact, the court informed Hogan that it would enter summary judgment dismissing his claim unless he tendered a factual issue. When Hogan offered no further evidence, the District Court entered summary judgment in favor of the State. Record 73.

The Court of Appeals for the Fifth Circuit reversed, holding that, because the admissions policy discriminates on the basis of gender, the District Court improperly used a "rational relationship" test to judge the constitutionality of the policy. 646 F. 2d 1116, 1118 (1981). Instead, the Court of Appeals stated, the proper test is whether the State has carried the heavier burden of showing that the gender-based classification is substantially related to an important governmental objective. *Id.*, at 1118, 1119. Recognizing that the State has a significant interest in providing educational opportunities for all its citizens, the court then found that the State had failed to show that providing a unique educational opportunity for females, but not for males, bears a substantial relationship to that interest. *Id.*, at 1119. Holding that the policy excluding Hogan because of his sex denies him equal protection of the laws, the court vacated the summary judgment entered against Hogan as to his claim for monetary damages, and remanded for entry of a declaratory judgment in conformity with its opinion and for further appropriate proceedings. *Id.*, at 1119–1120.

---

[4] Dr. James Strobel, President of MUW, verified that men could audit the equivalent of a full classload in either night or daytime classes. *Id.*, at 39–40.

On rehearing, the State contended that Congress, in enacting § 901(a)(5) of Title IX of the Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373, 20 U. S. C. § 1681 *et seq.*, expressly had authorized MUW to continue its single-sex admissions policy by exempting public undergraduate institutions that traditionally have used single-sex admissions policies from the gender discrimination prohibition of Title IX.[5] Through that provision, the State argued, Congress limited the reach of the Fourteenth Amendment by exercising its power under §5 of the Amendment.[6] The Court of Appeals rejected the argument, holding that §5 of the Fourteenth Amendment does not grant Congress power to authorize States to maintain practices otherwise violative of the Amendment. 653 F. 2d 222 (1981).

---

[5] Section 901(a) of Title IX, Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373, 20 U. S. C. § 1681(a), provides in part:

"(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

"(1) . . . in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

. . . . .

"(5) . . . in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex. . . ."

We granted certiorari, 454 U. S. 962 (1981), and now affirm the judgment of the Court of Appeals.[7]

II

We begin our analysis aided by several firmly established principles. Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Reed* v. *Reed*, 404 U. S. 71, 75 (1971). That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.[8] *Caban* v. *Mo-*

---

[6] Section 5 of the Fourteenth Amendment provides:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[7] Although some statements in the Court of Appeals' decision refer to all schools within MUW, see 646 F. 2d, at 1119, the factual underpinning of Hogan's claim for relief involved only his exclusion from the nursing program, Complaint ¶8–10, and the Court of Appeals' holding applies only to Hogan's individual claim for relief. 646 F. 2d, at 1119–1120. Additionally, during oral argument, counsel verified that Hogan sought only admission to the School of Nursing. Tr. of Oral Arg. 24. Because Hogan's claim is thus limited, and because we review judgments, not statements in opinions, *Black* v. *Cutter Laboratories*, 351 U. S. 292 (1956), we decline to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment.

[8] Without question, MUW's admissions policy worked to Hogan's disadvantage. Although Hogan could have attended classes and received credit in one of Mississippi's state-supported coeducational nursing programs, none of which was located in Columbus, he could attend only by driving a considerable distance from his home. Tr. 19–20, 63–65. A similarly situ-

hammed, 441 U. S. 380, 394 (1979); *Orr* v. *Orr*, 440 U. S. 268, 279 (1979). Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg* v. *Feenstra*, 450 U. S. 455, 461 (1981); *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 273 (1979). The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 150 (1980).[9]

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free

---

ated female would not have been required to choose between forgoing credit and bearing that inconvenience. Moreover, since many students enrolled in the School of Nursing hold full-time jobs, Deposition of Dean Annette K. Barrar 29–30, Hogan's female colleagues had available an opportunity, not open to Hogan, to obtain credit for additional training. The policy of denying males the right to obtain credit toward a baccalaureate degree thus imposed upon Hogan "a burden he would not bear were he female." *Orr* v. *Orr*, 440 U. S. 268, 273 (1979).

[9] In his dissenting opinion, JUSTICE POWELL argues that a less rigorous test should apply because Hogan does not advance a "serious equal protection claim." *Post*, at 742. JUSTICE BLACKMUN, without proposing an alternative test, labels the test applicable to gender-based discrimination as "rigid" and productive of "needless conformity." *Post*, at 734, 735. Our past decisions establish, however, that when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.

Thus, we apply the test previously relied upon by the Court to measure the constitutionality of gender-based discrimination. Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect. See *Stanton* v. *Stanton*, 421 U. S. 7, 13 (1975).

of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. See *Frontiero* v. *Richardson*, 411 U. S. 677, 684–685 (1973) (plurality opinion).[10]

If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.[11] The need for the requirement is amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a "proxy for other, more germane bases of classification," *Craig* v. *Boren*, 429 U. S. 190, 198 (1976), to establish a link between objective and classification.[12]

---

[10] History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function. In 1873, this Court remained unmoved by Myra Bradwell's argument that the Fourteenth Amendment prohibited a State from classifying her as unfit to practice law simply because she was female. *Bradwell* v. *Illinois*, 16 Wall. 130 (1873). In his opinion concurring in the judgment, Justice Bradley described the reasons underlying the State's decision to determine which positions only men could fill:

"It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." *Id.*, at 142.

In a similar vein, the Court in *Goesaert* v. *Cleary*, 335 U. S. 464, 466 (1948), upheld a legislature's right to preclude women from bartending, except under limited circumstances, on the ground that the legislature could devise preventive measures against "moral and social problems" that result when women, but apparently not men, tend bar. Similarly, the many protective labor laws enacted in the late 19th and early 20th centuries often had as their objective the protection of weaker workers, which the laws assumed meant females. See generally B. Brown, A. Freedman, H. Katz, & A. Price, Women's Rights and the Law 209–210 (1977).

---

[11] For instance, in *Stanton* v. *Stanton*, *supra*, this Court invalidated a state statute that specified a greater age of majority for males than for females and thereby affected the period during which a divorced parent was responsible for supporting his children. We did not question the importance or validity of the State's interest in defining parents' obligation to support children during their minority. On analysis, however, we determined that the purported relationship between that objective and the gender-based classification was based upon traditional assumptions that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl." 421 U. S., at 14–15. Once those traditional notions were abandoned, no basis for finding a substantial relationship between classification and objective remained.

[12] See, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981) (statute granted only husbands the right to manage and dispose of jointly owned property without the spouse's consent); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142 (1980) (statute required a widower, but not a widow, to show he was incapacitated from earning to recover benefits for a spouse's death under workers' compensation laws); *Orr* v. *Orr*, *supra* (only men could be ordered to pay alimony following divorce); *Craig* v. *Boren*, 429 U. S. 190 (1976) (women could purchase "nonintoxicating" beer at a younger age than could men); *Stanton* v. *Stanton*, *supra* (women reached majority at an earlier age than did men); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975) (widows, but not widowers, could collect survivors' benefits under the Social Security Act); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973) (determination of spouse's dependency based upon gender of member of Armed Forces claiming dependency benefits); *Reed* v. *Reed*, 404 U. S. 71 (1971) (statute preferred men to women as administrators of estates).

Applying this framework, we now analyze the arguments advanced by the State to justify its refusal to allow males to enroll for credit in MUW's School of Nursing.

III

A

The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. Brief for Petitioners 8.[13] As applied to the School of Nursing, we find the State's argument unpersuasive.

---

[13] In the reply brief, the State understandably retreated from its contention that MUW was founded to provide opportunities for women which were not available to men. Reply Brief for Petitioners 4. Apparently, the impetus for founding MUW came not from a desire to provide women with advantages superior to those offered men, but rather from a desire to provide white women in Mississippi access to state-supported higher learning. In 1856, Sally Reneau began agitating for a college for white women. Those initial efforts were unsuccessful, and, by 1870, Mississippi provided higher education only for white men and black men and women. E. Mayes, History of Education in Mississippi 178, 228, 245, 259, 266, 270 (1899) (hereinafter Mayes). See also S. Neilson, The History of Mississippi State College for Women 4–5 (unpublished manuscript, 1952) (hereinafter Neilson). In 1882, two years before MUW was chartered, the University of Mississippi opened its doors to women. However, the institution was in those early years not "extensively patronized by females; most of those who come being such as desire to qualify themselves to teach." Mayes, at 178. By 1890, the largest number of women in any class at the University had been 23, while nearly 350 women enrolled in the first session of MUW. *Id.*, at 178, 253. Because the University did not solicit the attendance of women until after 1920, and did not accept women at all for a time between 1907 and 1920, most Mississippi women who attended college attended MUW. Neilson, at 86. Thus, in Mississippi, as elsewhere in the country, women's colleges were founded to provide some form of higher education for the academically disenfranchised. See generally 2 T. Woody, A History of Women's Education in the United States 137–223 (1929); L. Baker, I'm Radcliffe! Fly Me! The Seven Sisters and the Failure of Women's Education 22, 136–141 (1976).

In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. See *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975). However, we consistently have emphasized that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 (1975). The same searching analysis must be made, regardless of whether the State's objective is to eliminate family controversy, *Reed* v. *Reed*, 404 U. S. 71 (1971), to achieve administrative efficiency, *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), or to balance the burdens borne by males and females.

It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. We considered such a situation in *Califano* v. *Webster*, 430 U. S. 313 (1977), which involved a challenge to a statutory classification that allowed women to eliminate more low-earning years than men for purposes of computing Social Security retirement benefits. Although the effect of the classification was to allow women higher monthly benefits than were available to men with the same earning history, we upheld the statutory scheme, noting that it took into account that women "as such have been unfairly hindered from earning as much as men" and "work[ed] directly to remedy" the resulting economic disparity. *Id.*, at 318.

A similar pattern of discrimination against women influenced our decision in *Schlesinger* v. *Ballard*, *supra*. There, we considered a federal statute that granted female Naval officers a 13-year tenure of commissioned service before mandatory discharge, but accorded male officers only a 9-year tenure. We recognized that, because women were barred from combat duty, they had had fewer opportunities for promotion than had their male counterparts. By allowing women an additional four years to reach a particular rank before subjecting them to mandatory discharge, the statute directly compensated for other statutory barriers to advancement.

In sharp contrast, Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities. In fact, in 1970, the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide. U. S. Dept. of Health, Education, and Welfare, Earned Degrees Conferred: 1969–1970, Institutional Data 388 (1972). That year was not an aberration; one decade earlier, women had earned all the nursing degrees conferred in Mississippi and 98.9 percent of the degrees conferred nationwide. U. S. Dept. of Health, Education, and Welfare, Earned Degrees Conferred, 1959–1960: Bachelor's and Higher Degrees 135 (1960). As one would expect, the labor force reflects the same predominance of women in nursing. When MUW's School of Nursing began operation, nearly 98 percent of all employed registered nurses were female.[14] United States Bureau of Census, 1981 Statistical Abstract of the United States 402 (1981).

Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job.[15] By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy. See *Stanton* v. *Stanton*, 421 U. S. 7 (1975). Thus, we conclude that, although the State recited a "benign, compensatory purpose," it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.[16]

---

[14] Relatively little change has taken place during the past 10 years. In 1980, women received more than 94 percent of the baccalaureate degrees conferred nationwide, National Center for Education Statistics, 1981 Digest of Education Statistics 121 (1981), and constituted 96.5 percent of the registered nurses in the labor force. United States Bureau of Census, 1981 Statistical Abstract of the United States 402 (1981).

[15] Officials of the American Nurses Association have suggested that excluding men from the field has depressed nurses' wages. Hearings before

The policy is invalid also because it fails the second part of the equal protection test, for the State has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men.

---

the United States Equal Employment Opportunity Commission on Job Segregation and Wage Discrimination 510–511, 517–518, 523 (Apr. 1980). To the extent the exclusion of men has that effect, MUW's admissions policy actually penalizes the very class the State purports to benefit. Cf. *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975).

[16] Even were we to assume that discrimination against women affects their opportunity to obtain an education or to obtain leadership roles in nursing, the challenged policy nonetheless would be invalid, for the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination. Cf. *Califano* v. *Webster*, 430 U. S. 313, 318 (1977) (legislative history of the compensatory statute revealed that Congress "directly addressed the justification for differing treatment of men and women" and "purposely enacted the more favorable treatment for female wage earners . . ."). The State has provided no evidence whatever that the Mississippi Legislature has ever attempted to justify its differing treatment of men and women seeking nurses' training. Indeed, the only statement of legislative purpose is that in § 37–117–3 of the Mississippi Code, see n. 1, *supra*, a statement that relies upon the very sort of archaic and overbroad generalizations about women that we have found insufficient to justify a gender-based classification. *E. g.*, *Orr* v. *Orr*, 440 U. S. 268 (1979); *Stanton* v. *Stanton*, 421 U. S. 7 (1975).

MUW permits men who audit to participate fully in classes. Additionally, both men and women take part in continuing education courses offered by the School of Nursing, in which regular nursing students also can enroll. Deposition of Dr. James Strobel 56–60 and Deposition of Dean Annette K. Barrar 24–26. The uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, Deposition of Nancy L. Herban 4, that the presence of men in the classroom would not affect the performance of the female nursing students, Tr. 61 and Deposition of Dean Annette K. Barrar 7–8, and that men in coeducational nursing schools do not dominate the classroom. Deposition of Nancy Herban 6. In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.

Thus, considering both the asserted interest and the relationship between the interest and the methods used by the State, we conclude that the State has fallen far short of establishing the "exceedingly persuasive justification" needed to sustain the gender-based classification. Accordingly, we hold that MUW's policy of denying males the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment.[17]

B

In an additional attempt to justify its exclusion of men from MUW's School of Nursing, the State contends that MUW is the direct beneficiary "of specific congressional legislation which, on its face, permits the institution to exist as it has in the past." Brief for Petitioners 19. The argument is based upon the language of § 901(a) in Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681(a). Although § 901(a) prohibits gender discrimination in education programs that receive federal financial assistance, subsection 5 exempts the admissions policies of undergraduate institutions "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex" from the general prohibition. See n. 5, *supra*. Arguing that Congress enacted Title IX in furtherance of its power to enforce the Fourteenth Amendment, a power granted by § 5 of that Amendment, the State would have us conclude that § 901(a)(5) is but "a congressional limitation upon the broad prohibitions of the Equal Protection Clause of the Fourteenth Amendment." Brief for Petitioners 20.

---

[17] JUSTICE POWELL's dissent suggests that a second objective is served by the gender-based classification in that Mississippi has elected to provide women a choice of educational environments. *Post*, at 742–744. Since any gender-based classification provides one class a benefit or choice not available to the other class, however, that argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

The argument requires little comment. Initially, it is far from clear that Congress intended, through § 901(a)(5), to exempt MUW from any constitutional obligation. Rather, Congress apparently intended, at most, to exempt MUW from the requirements of Title IX.

Even if Congress envisioned a constitutional exemption, the State's argument would fail. Section 5 of the Fourteenth Amendment gives Congress broad power indeed to enforce the command of the Amendment and "to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion . . . ." *Ex parte Virginia*, 100 U. S. 339, 346 (1880). Congress' power under § 5, however, "is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach* v. *Morgan*, 384 U. S. 641, 651, n. 10 (1966). Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment. See, *e. g., Califano* v. *Goldfarb*, 430 U. S. 199, 210 (1977); *Williams* v. *Rhodes*, 393 U. S. 23, 29 (1968).

The fact that the language of § 901(a)(5) applies to MUW provides the State no solace: "[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution. *Marbury* v. *Madison*, 1 Cranch 137 (1803)." *Younger* v. *Harris*, 401 U. S. 37, 52 (1971).

IV

Because we conclude that the State's policy of excluding males from MUW's School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

CHIEF JUSTICE BURGER, dissenting.

I agree generally with JUSTICE POWELL's dissenting opinion. I write separately, however, to emphasize that the Court's holding today is limited to the context of a professional nursing school. *Ante*, at 723, n. 7, 727. Since the Court's opinion relies heavily on its finding that women have traditionally dominated the nursing profession, see *ante*, at 729–731, it suggests that a State might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program.

JUSTICE BLACKMUN, dissenting.

Unless Mississippi University for Women wished to preserve a historical anachronism, one only states the obvious when he observes that the University long ago should have replaced its original statement of purpose and brought its corporate papers into the 20th century. It failed to do so and, perhaps in partial consequence, finds itself in this litigation, with the Court's opinion, *ante*, at 719–720, and n. 1, now taking full advantage of that failure, to MUW's embarrassment and discomfiture.

Despite that failure, times have changed in the intervening 98 years. What was once an "Institute and College" is now a genuine university, with a 2-year School of Nursing established 11 years ago and then expanded to a 4-year baccalaureate program in 1974. But respondent Hogan "wants in" at this particular location in his home city of Columbus. It is not enough that his State of Mississippi offers baccalaureate programs in nursing open to males at Jackson and at Hattiesburg. Mississippi thus has not closed the doors of its educational system to males like Hogan. Assuming that he is qualified—and I have no reason whatsoever to doubt his qualifications—those doors are open and his maleness alone does not prevent his gaining the additional education he professes to seek.

I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values that mean much to some people by forbidding the State to offer them a choice while not depriving others of an alternative choice. JUSTICE POWELL in his separate opinion, *post*, p. 735, advances this theme well.

While the Court purports to write narrowly, declaring that it does not decide the same issue with respect to "separate but equal" undergraduate institutions for females and males, *ante*, at 720, n. 1, or with respect to units of MUW other than its School of Nursing, *ante*, at 723, n. 7, there is inevitable spillover from the Court's ruling today. That ruling, it seems to me, places in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant. The Court's reasoning does not stop with the School of Nursing of the Mississippi University for Women.

I hope that we do not lose all values that some think are worthwhile (and are not based on differences of race or religion) and relegate ourselves to needless conformity. The ringing words of the Equal Protection Clause of the Fourteenth Amendment—what JUSTICE POWELL aptly describes as its "liberating spirit," *post*, at 741—do not demand that price.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

The Court's opinion bows deeply to conformity. Left without honor—indeed, held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life. The Court in effect holds today that no State now may provide even a single institution of higher learning open only to women students. It gives no heed to the efforts of the State of Mississippi to provide abundant opportunities for young men and young women to attend coeducational institutions, and none to the preferences of the more than 40,000 young women who over the years have evidenced their approval of an all-women's college by choosing Mississippi University for Women (MUW) over seven coeducational universities within the State. The Court decides today that the Equal Protection Clause makes it unlawful for the State to provide women with a traditionally popular and respected choice of educational environment. It does so in a case instituted by one man, who represents no class, and whose primary concern is personal convenience.

It is undisputed that women enjoy complete equality of opportunity in Mississippi's public system of higher education. Of the State's 8 universities and 16 junior colleges, all except MUW are coeducational. At least two other Mississippi universities would have provided respondent with the nursing curriculum that he wishes to pursue.[1] No other male has joined in his complaint. The only groups with any personal acquaintance with MUW to file *amicus* briefs are female students and alumnae of MUW. And they have emphatically rejected respondent's arguments, urging that the State of Mississippi be allowed to continue offering the choice from which they have benefited.

---

[1] "[T]wo other Mississippi universities offered coeducational programs leading to a Bachelor of Science in Nursing—the University of Southern Mississippi in Hattiesburg, 178 miles from Columbus; and the University of

Nor is respondent significantly disadvantaged by MUW's all-female tradition. His constitutional complaint is based upon a single asserted harm: that he must *travel* to attend the state-supported nursing schools that concededly are available to him. The Court characterizes this injury as one of "inconvenience." *Ante*, at 724, n. 8. This description is fair and accurate, though somewhat embarrassed by the fact that there is, of course, no constitutional right to attend a state-supported university in one's home town. Thus the Court, to redress respondent's injury of inconvenience, must rest its invalidation of MUW's single-sex program on a mode of "sexual stereotype" reasoning that has no application whatever to the respondent or to the "wrong" of which he complains. At best this is anomalous. And ultimately the anomaly reveals legal error—that of applying a heightened equal protection standard, developed in cases of genuine sexual stereotyping, to a narrowly utilized state classification that provides an *additional* choice for women. Moreover, I believe that Mississippi's educational system should be upheld in this case even if this inappropriate method of analysis is applied.

I

Coeducation, historically, is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the Nation's population during much of our history has been educated in sexually segregated classrooms. At the college level, for instance, until recently some of the most prestigious colleges and universi-

---

Mississippi in Jackson, 147 miles from Columbus . . . ." Brief for Respondent 3. See also Tr. of Oral Arg. 8.

ties—including most of the Ivy League—had long histories of single-sex education. As Harvard, Yale, and Princeton remained all-male colleges well into the second half of this century, the "Seven Sister" institutions established a parallel standard of excellence for women's colleges. Of the Seven Sisters, Mount Holyoke opened as a female seminary in 1837 and was chartered as a college in 1888. Vassar was founded in 1865, Smith and Wellesley in 1875, Radcliffe in 1879, Bryn Mawr in 1885, and Barnard in 1889. Mount Holyoke, Smith, and Wellesley recently have made considered decisions to remain essentially single-sex institutions. See Carnegie Commission on Higher Education, Opportunities for Women in Higher Education 70–75 (1973) (Carnegie Report), excerpted in B. Babcock, A. Freedman, E. Norton, & S. Ross, Sex Discrimination and the Law 1013, 1014 (1975) (Babcock). Barnard retains its independence from Columbia, its traditional coordinate institution. Harvard and Radcliffe maintained separate admissions policies as recently as 1975.[2]

The sexual segregation of students has been a reflection of, rather than an imposition upon, the preference of those subject to the policy. It cannot be disputed, for example, that the highly qualified women attending the leading women's colleges could have earned admission to virtually any college of their choice.[3] Women attending such colleges have chosen to be there, usually expressing a preference for the special benefits of single-sex institutions. Similar decisions were made by the colleges that elected to remain open to women only.[4]

---

[2] The history, briefly summarized above, of single-sex higher education in the Northeast is duplicated in other States. I mention only my State of Virginia, where even today Hollins College, Mary Baldwin College, Randolph Macon Woman's College, and Sweet Briar College remain all women's colleges. Each has a proud and respected reputation of quality education.

[3] It is true that historically many institutions of higher education—particularly in the East and South—were single-sex. To these extents, choices were by no means universally available to all men and women. But choices always were substantial, and the purpose of relating the experience of our country with single-sex colleges and universities is to document what should be obvious: generations of Americans, including scholars, have thought—wholly without regard to any discriminatory animus—that there were distinct advantages in this type of higher education.

The arguable benefits of single-sex colleges also continue to be recognized by students of higher education. The Carnegie Commission on Higher Education has reported that it "favor[s] the continuation of colleges for women. They provide an element of diversity . . . and [an environment in which women] generally . . . speak up more in their classes, . . . hold more positions of leadership on campus, . . . and . . . have more role models and mentors among women teachers and administrators." Carnegie Report, quoted in K. Davidson, R. Ginsburg, & H. Kay, Sex-Based Discrimination 814 (1975 ed.). A 10-year empirical study by the Cooperative Institutional Research Program of the American Counsel of Education and the University of California, Los Angeles, also has affirmed the distinctive benefits of single-sex colleges and universities. As summarized in A. Astin, Four Critical Years 232 (1977), the data established that

> "[b]oth [male and female] single-sex colleges facilitate student involvement in several areas: academic, interaction with faculty, and verbal aggressiveness. . . . Men's and women's colleges also have a positive effect on intellectual self-esteem. Students at single-sex colleges are more satisfied than students at coeducational col-

---

[4] In announcing Wellesley's decision in 1973 to remain a women's college, President Barbara Newell said that "[t]he research we have clearly demonstrates that women's colleges produce a disproportionate number of women leaders and women in responsible positions in society; it does demonstrate that the higher proportion of women on the faculty the higher the motivation for women students." Carnegie Report, in Babcock, at 1014. Similarly rejecting coeducation in 1971, the Mount Holyoke Trustees Committee on Coeducation reported that "the conditions that historically justified the founding of women's colleges" continued to justify their remaining in that tradition. *Ibid.*

> leges with virtually all aspects of college life . . . . The only area where students are less satisfied is social life."[5]

Despite the continuing expressions that single-sex institutions may offer singular advantages to their students, there is no doubt that coeducational institutions are far more numerous. But their numerical predominance does not establish—in any sense properly cognizable by a court—that individual preferences for single-sex education are misguided or illegitimate, or that a State may not provide its citizens with a choice.[6]

II

The issue in this case is whether a State transgresses the Constitution when—within the context of a public system that offers a diverse range of campuses, curricula, and educational alternatives—it seeks to accommodate the legitimate personal preferences of those desiring the advantages of an all-women's college. In my view, the Court errs seriously by assuming—without argument or discussion—that the equal protection standard generally applicable to sex discrimination is appropriate here. That standard was designed to free women from "archaic and overbroad generalizations . . . ." *Schlesinger* v. *Ballard*, 419 U. S. 498, 508 (1975). In no previous case have we applied it to invalidate state efforts to *expand* women's choices. Nor are there prior sex discrimination decisions by this Court in which a male plaintiff, as in this case, had the choice of an equal benefit.

---

[5] In this Court the benefits of single-sex education have been asserted by the students and alumnae of MUW. One would expect the Court to regard their views as directly relevant to this case:

"[I]n the aspect of life known as courtship or mate-pairing, the American female remains in the role of the pursued sex, expected to adorn and groom herself to attract the male. Without comment on the common sense or equities of this social arrangement, it remains a sociological fact.

"An institution of collegiate higher learning maintained exclusively for women is uniquely able to provide the education atmosphere in which some, but not all, women can best attain maximum learning potential. It can serve to overcome the historic repression of the past and can orient a woman to function and achieve in the still male dominated economy. It can free its students of the burden of playing the mating game while attending classes, thus giving academic rather than sexual emphasis. Consequently, many such institutions flourish and their graduates make significant contributions to the arts, professions and business." Brief for Mississippi University for Women Alumnae Association as *Amicus Curiae* 2–3.

[6] "[T]he Constitution does not require that a classification keep abreast of the latest in educational opinion, especially when there remains a respectable opinion to the contrary . . . . Any other rule would mean that courts and not legislatures would determine all matters of public policy." *Williams* v. *McNair*, 316 F. Supp. 134, 137 (SC 1970) (footnote omitted), summarily aff'd, 401 U. S. 951 (1971).

The cases cited by the Court therefore do not control the issue now before us. In most of them women were given no opportunity for the same benefit as men.[7] Cases involving male plaintiffs are equally inapplicable. In *Craig* v. *Boren*, 429 U. S. 190 (1976), a male under 21 was not permitted to buy beer anywhere in the State, and women were afforded no choice as to whether they would accept the "statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups." *Id.*, at 209. A similar situation prevailed in *Orr* v. *Orr*, 440 U. S. 268, 279 (1979), where men had no opportunity to seek alimony from their divorced wives, and women had no escape from the statute's stereotypical announcement of "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role . . . ."[8]

---

[7] See *Kirchberg* v. *Feenstra*, 450 U. S. 455, 456 (1981) (invalidating statute "that gave husband, as 'head and master' of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent"); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 147 (1980) (invalidating law under which the benefits "that the working woman can expect to be paid to her spouse in the case of her work-related death are less than those payable to the spouse of the deceased male wage earner"); *Stanton* v. *Stanton*, 421 U. S. 7 (1975) (invalidating statute that provided a shorter period of parental support obligation for female children than for male children); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 645 (1975) (invalidating statute that failed to grant a woman worker "the same protection which a similarly situated male worker would have received"); *Frontiero* v. *Richardson*, 411 U. S. 677, 683 (1973) (invalidating statute containing a "mandatory preference for male applicants"); *Reed* v. *Reed*, 404 U. S. 71, 74 (1971) (invalidating an "arbitrary preference established in favor of males" in the administration of decedent's estates).

By applying heightened equal protection analysis to this case,[9] the Court frustrates the liberating spirit of the Equal Protection Clause. It prohibits the States from providing women with an opportunity to choose the type of university they prefer. And yet it is these women whom the Court regards as the *victims* of an illegal, stereotyped perception of the role of women in our society. The Court reasons this way in a case in which no woman has complained, and the only complainant is a man who advances no claims on behalf of anyone else. His claim, it should be recalled, is not that he is being denied a substantive educational opportunity, or even the right to attend an all-male or a coeducational college. See Brief for Respondent 24.[10] It is *only* that the colleges open to him are located at inconvenient distances.[11]

---

[8] See also *Caban* v. *Mohammed*, 441 U. S. 380 (1979) (invalidating law that both denied men the opportunity—given to women—of blocking the adoption of his illegitimate child by means of withholding his consent, and did not permit men to counter the statute's generalization that the maternal role is more important to women than the paternal role is to men).

[9] Even the Court does not argue that the appropriate standard here is "strict scrutiny"—a standard that none of our "sex discrimination" cases ever has adopted. Sexual segregation in education differs from the tradition, typified by the decision in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), of "separate but equal" *racial* segregation. It was characteristic of racial segregation that segregated facilities were offered, not as alternatives to increase the choices available to blacks, but as the *sole* alternative. MUW stands in sharp contrast. Of Mississippi's 8 public universities and 16 public junior colleges, only MUW considers sex as a criterion for admission. Women consequently are free to select a coeducational education environment for themselves if they so desire; their attendance at MUW is not a matter of coercion.

III

The Court views this case as presenting a serious equal protection claim of sex discrimination. I do not, and I would sustain Mississippi's right to continue MUW on a rational-basis analysis. But I need not apply this "lowest tier" of scrutiny. I can accept for present purposes the standard applied by the Court: that there is a gender-based distinction that must serve an important governmental objective by means that are substantially related to its achievement. *E. g., Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 150 (1980). The record in this case reflects that MUW has a historic position in the State's educational system dating back to 1884. More than 2,000 women presently evidence their preference for MUW by having enrolled there. The choice is one that discriminates invidiously against no one.[12] And the State's purpose in preserving that choice is legitimate and substantial. Generations of our finest minds, both among educators and students, have believed that single-sex, college-level institutions afford distinctive benefits. There are many persons, of course, who have different views. But simply because there are these differences is no reason—certainly none of constitutional dimension—to conclude that no substantial state interest is served when such a choice is made available.

---

[10] The Court says that "any gender-based classification provides one class a benefit or choice not available to the other class . . . ." *Ante*, at 731, n. 17. It then states that the issue "is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit *only* upon *one* class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." *Ibid.* (emphasis added). This is *not* the issue in this case. Hogan is not complaining about any benefit conferred upon women. Nor is he claiming discrimination because Mississippi offers no all-male college. As his brief states: "Joe Hogan does not ask to attend an all-male college which offers a Bachelor of Science in Nursing; he asks only to attend MUW." Brief for Respondent 24. And he asks this only for his personal convenience.

[11] Students in respondent's position, in "being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State supported college or university. The location of any such institution must necessarily inure to the benefit of some and to the detriment of others, depending upon the distance the affected individuals reside from the institution." *Heaton* v. *Bristol*, 317 S. W. 2d 86, 99 (Tex. Civ. App. 1958), cert. denied, 359 U. S. 230 (1959), quoted in *Williams* v. *McNair*, 316 F. Supp., at 137.

In arguing to the contrary, the Court suggests that the MUW is so operated as to "perpetuate the stereotyped view of nursing as an exclusively women's job." *Ante*, at 729. But as the Court itself acknowledges, *ante*, at 720, MUW's School of Nursing was not created until 1971—about 90 years after the single-sex campus itself was founded. This hardly supports a link between nursing as a woman's profession and MUW's single-sex admission policy. Indeed, MUW's School of Nursing was not instituted until more than a decade *after* a separate School of Nursing was established at the coeducational University of Mississippi at Jackson. See University of Mississippi, 1982 Undergraduate Catalog 162. The School of Nursing makes up only one part—a relatively small part[13]—of MUW's diverse modern university campus and curriculum. The other departments on the MUW campus offer a typical range of degrees[14] and a typical range of subjects.[15] There is no indication that women suffer fewer opportunities at other Mississippi state campuses because of MUW's admission policy.[16]

---

[12] "'Such a plan (i. e., giving the student a choice of a "single-sex" and coeducational institutions) exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefit of the best, most varied system of higher education that the State can supply.'" *Williams* v. *McNair*, *supra*, at 138, n. 15, quoting *Heaton* v. *Bristol*, *supra*, at 100.

[13] For instance, the School of Nursing takes up 15 pages of MUW's 234-page course catalog. See Mississippi University for Women, 81/82 Bulletin 185–200.

[14] *E. g.*, Bachelor of Arts; Bachelor of Science; Master of Arts; Master of Science. See *id.*, at 40. MUW also offers special preprofessional pro-

In sum, the practice of voluntarily chosen single-sex education is an honored tradition in our country, even if it now rarely exists in state colleges and universities. Mississippi's accommodation of such student choices is legitimate because it is completely consensual and is important because it permits students to decide for themselves the type of college education they think will benefit them most. Finally, Mississippi's policy is substantially related to its long-respected objective.[17]

---

grams in law, dentistry, medicine, pharmacy, physical therapy, and veterinary medicine. *Ibid.*

[15] MUW's Bulletin in its Table of Contents lists the following subjects (offered in its School of Arts and Sciences): Air Force ROTC; Art; Behavioral Sciences; Biological Sciences; Business and Economics; Cooperative Education; English and Foreign Languages; Health, Physical Education, Recreation, and Dance; History, Journalism and Broadcasting; Mathematics; Music; Physical Sciences; and Speech Communication. See *id.*, at 3.

[16] For instance, the catalog for the coeducational University of Mississippi lists in its general description the "Sarah Isom Center for Women's Studies," which is described as "dedicated to the development of curriculum and scholarship about women, the dissemination of information about their expanding career opportunities, and the establishment of mutual support networks for women of all ages and backgrounds." University of Mississippi, 1982 Undergraduate Catalog 13–14. This listing precedes information about the University's Law and Medical Centers. *Id.*, at 14–15.

[17] The Court argues that MUW's means are not sufficiently related to its goal because it has allowed men to audit classes. The extent of record information is that men have audited 138 courses in the last 10 years. Brief for Respondent 21. On average, then, men have audited 14 courses a year. MUW's current annual catalog lists 913 courses offered in *one* year. See Mississippi University for Women, 81/82 Bulletin *passim*.

It is understandable that MUW might believe that it could allow men to audit courses without materially affecting its environment. MUW charges tuition but gives no academic credit for auditing. The University evidently is correct in believing that few men will choose to audit under such circumstances. This deviation from a perfect relationship between means and ends is insubstantial.

IV

A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system. At stake in this case as I see it is the preservation of a small aspect of this diversity. But that aspect is by no means insignificant, given our heritage of available choice between single-sex and coeducational institutions of higher learning. The Court answers that there is discrimination—not just that which may be tolerable, as for example between those candidates for admission able to contribute most to an educational institution and those able to contribute less—but discrimination of constitutional dimension. But, having found "discrimination," the Court finds it difficult to identify the victims. It hardly can claim that women are discriminated against. A constitutional case is held to exist solely because one man found it inconvenient to travel to any of the other institutions made available to him by the State of Mississippi. In essence he insists that he has a right to attend a college in his home community. This simply is not a sex discrimination case. The Equal Protection Clause was never intended to be applied to this kind of case.[18]

---

[18] The Court, in the opening and closing sentences and note 7 of its opinion, states the issue in terms only of a "professional nursing school" and "decline[s] to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment." This would be a welcome limitation if, in fact, it leaves MUW free to remain an all-women's university in each of its other schools and departments—which include four schools and more than a dozen departments. Cf. nn. 13–15, *supra*. The question the Court does not answer is whether MUW may remain a women's university in every respect except its School of Nursing. This is a critical question for this University and its responsible board and officials. The Court holds today that they have deprived Hogan of constitutional rights because MUW is adjudged guilty of sex discrimination. The logic of the Court's entire opinion, apart from its statements mentioned above, appears to apply sweepingly to the entire University. The exclusion of men

---

from the School of Nursing is repeatedly characterized as "gender-based discrimination," subject to the same standard of analysis applied in previous sex discrimination cases of this Court. Nor does the opinion anywhere deny that this analysis applies to the entire University.

The Court nevertheless purports to decide this case "narrow[ly]." Normally and properly we decide only the question presented. It seems to me that in fact the issue properly before us is the single-sex policy of the University, and it is this issue that I have addressed in this dissent. The Court of Appeals so viewed this case, and unambiguously held that a single-sex state institution of higher education no longer is permitted by the Constitution. I see no principled way—in light of the Court's rationale—to reach a different result with respect to other MUW schools and departments. But given the Court's insistence that its decision applies only to the School of Nursing, it is my view that the Board and officials of MUW may continue to operate the remainder of the University on a single-sex basis without fear of personal liability. The standard of such liability is whether the conduct of the official "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). The Court today leaves in doubt the reach of its decision.

NEW YORK *v.* FERBER

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 81-55. Argued April 27, 1982—Decided July 2, 1982

A New York statute prohibits persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance. The statute defines "sexual performance" as any performance that includes sexual conduct by such a child, and "sexual conduct" is in turn defined as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals. Respondent bookstore proprietor was convicted under the statute for selling films depicting young boys masturbating, and the Appellate Division of the New York Supreme Court affirmed. The New York Court of Appeals reversed, holding that the statute violated the First Amendment as being both underinclusive and overbroad. The court reasoned that in light of the explicit inclusion of an obscenity standard in a companion statute banning the knowing dissemination of similarly defined material, the statute in question could not be construed to include an obscenity standard, and therefore would prohibit the promotion of materials traditionally entitled to protection under the First Amendment.

Held: As applied to respondent and others who distribute similar material, the statute in question does not violate the First Amendment as applied to the States through the Fourteenth Amendment. Pp. 753-774.

(a) The States are entitled to greater leeway in the regulation of pornographic depictions of children for the following reasons: (1) the legislative judgment that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child, easily passes muster under the First Amendment; (2) the standard of *Miller* v. *California*, 413 U. S. 15, for determining what is legally obscene is not a satisfactory solution to the child pornography problem; (3) the advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation; (4) the value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest, if not *de minimis;* and (5) recognizing and classifying child pornography as a category of material outside the First Amendment's protection is not incompatible with this Court's decisions dealing with what speech is unprotected. When a definable class of material, such as that covered by the New

York statute, bears so heavily and pervasively on the welfare of children engaged in its production, the balance of competing interests is clearly struck, and it is permissible to consider these materials as without the First Amendment's protection. Pp. 756–764.

(b) The New York statute describes a category of material the production and distribution of which is not entitled to First Amendment protection. Accordingly, there is nothing unconstitutionally "underinclusive" about the statute, and the State is not barred by the First Amendment from prohibiting the distribution of such unprotected materials produced outside the State. Pp. 764–766.

(c) Nor is the New York statute unconstitutionally overbroad as forbidding the distribution of material with serious literary, scientific, or educational value. The substantial overbreath rule of *Broadrick* v. *Oklahoma*, 413 U. S. 601, applies. This is the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which [the statute's] sanctions, assertedly, may not be applied." *Broadrick* v. *Oklahoma*, *supra*, at 615–616. Pp. 766–774.

52 N. Y. 2d 674, 422 N. E. 2d 523, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 774. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 775. BLACKMUN, J., concurred in the result. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 777.

Robert M. Pitler argued the cause for petitioner. With him on the briefs was *Mark Dwyer*.

Herald Price Fahringer argued the cause for respondent. With him on the brief was *Paul J. Cambria, Jr.**

---

*Briefs of *amici curiae* urging reversal were filed by *Edmund J. Burns*, *Gregory A. Loken*, and *William A. Cahill, Jr.*, for Covenant House; and by *John J. Walsh* for Morality in Media, Inc.

Michael A. Bamberger filed a brief for the American Booksellers Association, Inc., et al., as *amici curiae* urging affirmance.

Bruce A. Taylor filed a brief for Charles H. Keating, Jr., et al., as *amici curiae*.

JUSTICE WHITE delivered the opinion of the Court.

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

I

In recent years, the exploitive use of children in the production of pornography has become a serious national problem.[1] The Federal Government and 47 States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-five States and the United States Congress have also passed legislation prohibiting the distribution of such materials; 20 States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.[2]

---

[1] "[C]hild pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale." S. Rep. No. 95-438, p. 5 (1977). One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. *Ibid.* "Such magazines depict children, some as young as three to five years of age . . . . The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism." *Id.*, at 6. In Los Angeles alone, police reported that 30,000 children have been sexually exploited. Sexual Exploitation of Children, Hearings before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess., 41–42 (1977).

[2] In addition to New York, 19 States have prohibited the dissemination of material depicting children engaged in sexual conduct regardless of whether the material is obscene. Ariz. Rev. Stat. Ann. § 13–3553 (Supp. 1981–1982); Colo. Rev. Stat. § 18–6–403 (Supp. 1981); Del. Code Ann., Tit. 11, §§ 1108, 1109 (1979); Fla. Stat. § 847.014 (1981); Haw. Rev. Stat. § 707–751 (Supp. 1981); Ky. Rev. Stat. §§ 531.320, 531.340–531.360 (Supp. 1980); La. Rev. Stat. Ann. § 14:81.1(A)(3) (West Supp. 1982); Mass. Gen.

New York is one of the 20. In 1977, the New York Legislature enacted Article 263 of its Penal Law. N. Y. Penal Law, Art. 263 (McKinney 1980). Section 263.05 criminalizes as a class C felony the use of a child in a sexual performance:

> "A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child,

---

Laws Ann., ch. 272, § 29A (West Supp. 1982–1983); Mich. Comp. Laws Ann. § 750.145c(3) (1982–1983); Miss. Code Ann. § 97–5–33(4) (Supp. 1981); Mont. Code Ann. § 45–5–625 (1981); N. J. Stat. Ann. § 2C:24–4(b)(5) (West 1981); Okla. Stat., Tit. 21, § 1021.2 (1981); Pa. Stat. Ann., Tit. 18, § 6312(c) (Purdon 1982–1983); R. I. Gen. Laws § 11–9–1.1 (1981); Tex. Penal Code Ann. § 43.25 (1982); Utah Code Ann. § 76–10–1206.5(3) (Supp. 1981); W. Va. Code § 61–8C–3 (Supp. 1981); Wis. Stat. § 940.203(4) (1979–1980).

Fifteen States prohibit the dissemination of such material only if it is obscene. Ala. Code §§ 13–7–231, 13–7–232 (Supp. 1981); Ark. Stat. Ann. § 41–4204 (Supp. 1981); Cal. Penal Code Ann. § 311.2(b) (West Supp. 1982) (general obscenity statute); Ill. Rev. Stat., ch. 38, ¶ 11–20a(b)(1) (1979); Ind. Code § 35–30–10.1–2 (1979); Me. Rev. Stat. Ann., Tit. 17, § 2923(1) (Supp. 1981–1982); Minn. Stat. §§ 617.246(3) and (4) (1980); Neb. Rev. Stat. § 28–1463(2) (1979); N. H. Rev. Stat. Ann. § 650:2(II) (Supp. 1981); N. D. Cent. Code § 12.1–27.1–01 (1976) (general obscenity statute); Ohio Rev. Code Ann. § 2907.321(A) (1982); Ore. Rev. Stat. § 163.485 (1981); S. D. Codified Laws §§ 22–22–24, 22–22–25 (1979); Tenn. Code Ann. § 39–1020 (Supp. 1981); Wash. Rev. Code § 9.68A.030 (1981). The federal statute also prohibits dissemination only if the material is obscene. 18 U. S. C. § 2252(a) (1976 ed., Supp. IV). Two States prohibit dissemination only if the material is obscene as to minors. Conn. Gen. Stat. § 53a–196b (1981); Va. Code § 18.2–374.1 (1982).

Twelve States prohibit only the use of minors in the production of the material. Alaska Stat. Ann. § 11.41.455 (1978); Ga. Code § 26–9943a(b) (1978); Idaho Code § 44–1306 (1977); Iowa Code § 728.12 (1981); Kan. Stat. Ann. § 21–3516 (1981); Md. Ann. Code, Art. 27, § 419A (Supp. 1981); Mo. Rev. Stat. § 568.060(1)(b) (1978); Nev. Rev. Stat. § 200.509 (1981); N. M. Stat. Ann. § 30–6–1 (Supp. 1982); N. C. Gen. Stat. § 14–190.6 (1981); S. C. Code § 16–15–380 (Supp. 1981); Wyo. Stat. § 14–3–102(a)(v)(E) (1978).

> he consents to the participation by such child in a sexual performance."

A "[s]exual performance" is defined as "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age." § 263.00(1). "Sexual conduct" is in turn defined in § 263.00(3):

> "'Sexual conduct' means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."

A performance is defined as "any play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." § 263.00(4).

At issue in this case is § 263.15, defining a class D felony:[3]

> "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."

To "promote" is also defined:

> "'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same." § 263.00(5).

A companion provision bans only the knowing dissemination of obscene material. § 263.10.

This case arose when Paul Ferber, the proprietor of a Manhattan bookstore specializing in sexually oriented products, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young boys masturbating. Ferber was indicted on two counts of violating § 263.10 and two counts of violating § 263.15, the two New York laws controlling dissemination of child pornography.[4] After a jury trial, Ferber was acquitted of the two counts of promoting an obscene sexual performance, but found guilty of the two counts under § 263.15, which did not require proof that the films were obscene. Ferber's convictions were affirmed without opinion by the Appellate Division of the New York State Supreme Court. 74 App. Div. 2d 558, 424 N. Y. S. 2d 967 (1980).

---

[3] Class D felonies carry a maximum punishment of imprisonment for up to seven years as to individuals, and as to corporations a fine of up to $10,000. N. Y. Penal Law §§ 70.00, 80.10 (McKinney 1975). Respondent Ferber was sentenced to 45 days in prison.

The New York Court of Appeals reversed, holding that § 263.15 violated the First Amendment. 52 N. Y. 2d 674, 422 N. E. 2d 523 (1981). The court began by noting that in light of § 263.10's explicit inclusion of an obscenity standard, § 263.15 could not be construed to include such a standard. Therefore, "the statute would . . . prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment." 52 N. Y. 2d, at 678, 422 N. E. 2d, at 525. Although the court recognized the State's "legitimate interest in protecting the welfare of minors" and noted that this "interest may transcend First Amendment concerns," *id.*, at 679, 422 N. E. 2d, at 525–526, it nevertheless found two fatal defects in the New York statute. Section 263.15 was underinclusive because it discriminated against visual portrayals of children engaged in sexual activity by not also prohibiting the distribution of films of other dangerous activity. It was also overbroad because it prohibited the distribution of materials produced outside the State, as well as materials, such as medical books and educational sources, which

---

[4] A state judge rejected Ferber's First Amendment attack on the two sections in denying a motion to dismiss the indictment. 96 Misc. 2d 669, 409 N. Y. S. 2d 632 (1978).

"deal with adolescent sex in a realistic but nonobscene manner." 52 N. Y. 2d, at 681, 422 N. E. 2d, at 526. Two judges dissented. We granted the State's petition for certiorari, 454 U. S. 1052 (1981), presenting the single question:

> "To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?"

II

The Court of Appeals proceeded on the assumption that the standard of obscenity incorporated in § 263.10, which follows the guidelines enunciated in *Miller* v. *California*, 413 U. S. 15 (1973),[5] constitutes the appropriate line dividing protected from unprotected expression by which to measure a regulation directed at child pornography. It was on the premise that "nonobscene adolescent sex" could not be singled out for special treatment that the court found § 263.15 "strikingly underinclusive." Moreover, the assumption that the constitutionally permissible regulation of pornography could not be more extensive with respect to the distribution of material depicting children may also have led the court to conclude that a narrowing construction of § 263.15 was unavailable.

The Court of Appeals' assumption was not unreasonable in light of our decisions. This case, however, constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children. We believe our inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children.

---

[5] N. Y. Penal Law § 235.00(1) (McKinney 1980); *People* v. *Illardo*, 48 N. Y. 2d 408, 415, and n. 3, 399 N. E. 2d 59, 62–63, and n. 3 (1979).

A

In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), the Court laid the foundation for the excision of obscenity from the realm of constitutionally protected expression:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*, at 571–572 (footnotes omitted).

Embracing this judgment, the Court squarely held in *Roth* v. *United States*, 354 U. S. 476 (1957), that "obscenity is not within the area of constitutionally protected speech or press." *Id.*; at 485. The Court recognized that "rejection of obscenity as utterly without redeeming social importance" was implicit in the history of the First Amendment: The original States provided for the prosecution of libel, blasphemy, and profanity, and the "universal judgment that obscenity should be restrained [is] reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956." *Id.*, at 484–485 (footnotes omitted).

Roth was followed by 15 years during which this Court struggled with "the intractable obscenity problem." *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 704 (1968) (opinion of Harlan, J.). See, *e. g.*, *Redrup* v. *New York*, 386 U. S. 767 (1967). Despite considerable vacillation over the proper definition of obscenity, a majority of the Members of the Court remained firm in the position that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller* v. *California, supra,* at 18–19 (footnote omitted); *Stanley* v. *Georgia,* 394 U. S. 557, 567 (1969); *Ginsberg* v. *New York,* 390 U. S. 629, 637–643 (1968); *Interstate Circuit, Inc.* v. *Dallas, supra,* at 690; *Redrup* v. *New York, supra,* at 769; *Jacobellis* v. *Ohio,* 378 U. S. 184, 195 (1964).

Throughout this period, we recognized "the inherent dangers of undertaking to regulate any form of expression." *Miller* v. *California, supra,* at 23. Consequently, our difficulty was not only to assure that statutes designed to regulate obscene materials sufficiently defined what was prohibited, but also to devise substantive limits on what fell within the permissible scope of regulation. In *Miller* v. *California, supra,* a majority of the Court agreed that a "state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.,* at 24. Over the past decade, we have adhered to the guidelines expressed in *Miller,*[6] which subsequently has been followed in the regulatory schemes of most States.[7]

---

[6] *Hamling* v. *United States,* 418 U. S. 87 (1974); *Jenkins* v. *Georgia,* 418 U. S. 153 (1974); *Ward* v. *Illinois,* 431 U. S. 767 (1977); *Marks* v. *United States,* 430 U. S. 188 (1977); *Pinkus* v. *United States,* 436 U. S. 293 (1978).

[7] Thirty-seven States and the District of Columbia have either legislatively adopted or judicially incorporated the *Miller* test for obscenity. Ala. Code § 13A–12–150 (Supp. 1981); Ariz. Rev. Stat. Ann. § 13–3501(2) (1978); Ark. Stat. Ann. § 41–3502(6) (Supp. 1981); Colo. Rev. Stat. § 18–7–101(2) (Supp. 1981); Del. Code Ann., Tit. 11, § 1364 (1979); *Lakin* v. *United States,* 363 A. 2d 990 (D. C. 1976); Ga. Code § 26–2101(b) (1978); Haw. Rev. Stat. § 712–1210(6) (Supp. 1981); Idaho Code § 18–4101(A) (1979); Iowa Code § 728.4 (1981) (only child pornography covered); Ind. Code § 35–30–10.1–1(c) (1979); Kan. Stat. Ann. § 21–4301 (2)(a) (1981); Ky. Rev. Stat. § 531.010(3) (1975); La. Rev. Stat. Ann. §§ 14:106(A)(2) and (A)(3) (West Supp. 1982); *Ebert* v. *Maryland State Bd. of Censors,* 19 Md. App. 300, 313 A. 2d 536 (1973); Mass. Gen. Laws Ann., ch. 272, § 31 (West Supp. 1982–1983); *People* v. *Neumayer,* 405 Mich. 341, 275 N. W. 2d 230 (1979); *State* v. *Welke,* 298 Minn. 402, 216 N. W. 2d 641 (1974); Mo. Rev. Stat. § 573.010(1) (1978); Neb. Rev. Stat. § 28–807(9)

B

The *Miller* standard, like its predecessors, was an accommodation between the State's interests in protecting the "sensibilities of unwilling recipients" from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws. Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.

First. It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychologi-

---

(1979); Nev. Rev. Stat. § 201.235 (1981); N. H. Rev. Stat. Ann. § 650:1(IV) (Supp. 1981); N. J. Stat. Ann. § 2C:34-2 (West 1981); N. Y. Penal Law § 235.00(1) (McKinney 1980); N. C. Gen. Stat. § 14-190.1(b) (1981); N. D. Cent. Code § 12.1-27.1-01(4) (1976); *State* v. *Burgun*, 56 Ohio St. 2d 354, 384 N. E. 2d 255 (1978); *McCrary* v. *State*, 533 P. 2d 629 (Okla. Crim. App. 1974); Ore. Rev. Stat. § 167.087(2) (1981); Pa. Stat. Ann., Tit. 18, § 5903(b) (Purdon Supp. 1982–1983); R. I. Gen. Laws § 11-31-1 (1981); S. C. Code § 16-15-260(a) (Supp. 1981); S. D. Codified Laws § 22-24-27(10) (1979); Tenn. Code Ann. § 39-3001(1) (Supp. 1981); Tex. Penal Code Ann. § 43.21(a) (1982); Utah Code Ann. § 76-10-1203(1) (1978); Va. Code § 18.2-372 (1982); 1982 Wash. Laws., ch. 184, § 1(2).

Four States continue to follow the test approved in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966). Cal. Penal Code Ann. § 311(a) (West Supp. 1982); Conn. Gen. Stat. § 53a-193 (1981); Fla. Stat. § 847.07 (1981); Ill. Rev. Stat., ch. 38, ¶ 11-20(b) (1979). Five States regulate only the distribution of pornographic material to minors. Me. Rev. Stat. Ann., Tit. 17, § 2911 (Supp. 1981-1982); Mont. Code Ann. § 45-8-201 (1981); N. M. Stat. Ann. § 30-37-2 (Supp. 1982); Vt. Stat. Ann., Tit. 13, § 2802 (1974); W. Va. Code § 61-8A-2 (1977). Three state obscenity laws do not fall into any of the above categories. Miss. Code Ann. § 97-29-33 (1973), declared invalid in *ABC Interstate Theatres, Inc.* v. *State*, 325 So. 2d 123 (Miss. 1976); Wis. Stat. § 944.21(1)(a) (1979–1980), declared invalid in *State* v. *Princess Cinema of Milwaukee, Inc.*, 96 Wis. 2d 646, 292 N. W. 2d 807 (1980); Wyo. Stat. § 6-5-303 (1977). Alaska has no current state obscenity law.

A number of States employ a different obscenity standard with respect to material distributed to children. See, *e. g.*, Fla. Stat. § 847.0125 (1981).

cal well-being of a minor" is "compelling." *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 607 (1982). "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince* v. *Massachusetts*, 321 U. S. 158, 168 (1944). Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince* v. *Massachusetts, supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg* v. *New York, supra*, we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978).

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern:

> "[T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances." 1977 N. Y. Laws, ch. 910, § 1.[8]

---

[8] In addition, the legislature found "the sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urge[d] law enforcement officers to aggressively seek out and prosecute . . . the peddlers . . . of this filth by vigorously applying the sanctions contained in this act." 1977 N. Y. Laws, ch. 910, § 1.

We shall not second-guess this legislative judgment. Respondent has not intimated that we do so. Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating "child pornography." The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.[9] That judgment, we think, easily passes muster under the First Amendment.

---

[9] "[T]he use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole." S. Rep. No. 95–438, p. 5 (1977). It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults. Schoettle, Child Exploitation: A Study of Child Pornography, 19 J. Am. Acad. Child Psychiatry 289, 296 (1980) (hereafter cited as Child Exploitation); Schoettle, Treatment of the Child Pornography Patient, 137 Am. J. Psychiatry 1109, 1110 (1980); Densen-Gerner, Child Prostitution and Child Pornography: Medical, Legal, and Societal Aspects of the Commercial Exploitation of Children, reprinted in U. S. Dept. of Health and Human Services, Sexual Abuse of Children: Selected Readings 77, 80 (1980) (hereafter cited as Commercial Exploitation) (sexually exploited children predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution). See generally Burgess & Holmstrom, Accessory-to-Sex: Pressure, Sex, and Secrecy, in A. Burgess, A. Groth, L. Holmstrom, & S. Sgroi, Sexual Assault of Children and Adolescents 85, 94 (1978); V. De Francis, Protecting the Child Victim of Sex Crimes Committed by Adults 169 (1969); Ellerstein & Canavan, Sexual Abuse of Boys, 134 Am. J. Diseases of Children 255, 256–257 (1980); Finch, Adult Seduction of the Child: Effects on the Child, Medical Aspects of Human Sexuality 170, 185 (Mar. 1973); Groth, Sexual Trauma in the Life Histories of Rapists and Child Molesters, 4 Victimology 10 (1979). Sexual molestation by adults is often involved in the production of child sexual performances. Sexual Exploitation of Children, A Report to the Illinois General Assembly by the Illinois Legislative Investigating Commission 30–31 (1980). When such performances are recorded and distributed, the child's privacy interests are also invaded. See n. 10, *infra*.

Second. The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.[10] Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product. Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions.[11] Cf. *United States* v. *Darby*, 312 U. S. 100 (1941) (upholding federal restrictions on sale of goods manufactured in violation of Fair Labor Standards Act).

---

[10] As one authority has explained:

"[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981).

See also Child Exploitation 292 ("[I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions"); Note, Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 U. Mich. J. Law Reform 295, 301 (1979) (hereafter cited as Use in Pornography) (interview with child psychiatrist) ("The victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child").

Thus, distribution of the material violates "the individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U. S. 589, 599 (1977). Respondent cannot undermine the force of the privacy interests involved here by looking to *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), and *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979), cases protecting the right of newspapers to publish, respectively, the identity of a rape victim and a youth charged as a juvenile offender. Those cases only stand for the proposition that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order." *Id.*, at 103.

Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value." Memorandum of Assemblyman Lasher in Support of § 263.15. We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.[12]

---

[11] See Sexual Exploitation of Children, Hearings before the Subcommittee on Crime of the House Judiciary Committee, 95th Cong., 1st Sess., 34 (1977) (statement of Charles Rembar) ("It is an impossible prosecutorial job to try to get at the acts themselves"); *id.*, at 11 (statement of Frank Osanka, Professor of Social Justice and Sociology) ("[W]e have to be very careful . . . that we don't take comfort in the existence of statutes that are on the books in the connection with the use of children in pornography . . . . There are usually no witnesses to these acts of producing pornography"); *id.*, at 69 (statement of Investigator Lloyd Martin, Los Angeles Police Department) (producers of child pornography use false names making difficult the tracing of material back from distributor). See also L. Tribe, American Constitutional Law 666, n. 62 (1978); Note, Child Pornography: A New Role for the Obscenity Doctrine, 1978 U. Ill. Law Forum 711, 716, n. 29; Use in Pornography 315 ("passage of criminal laws aimed at producers without similar regulation of distributors will arguably shift the production process further underground").

Third. The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.[13] "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949).[14] We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.[15]

---

[12] In addition, legal obscenity under *Miller* is a function of "contemporary community standards." 413 U. S., at 24. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.*, at 32. It would be equally unrealistic to equate a community's toleration for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation. Furthermore, a number of States rely on stricter obscenity tests, see n. 7, *supra*, under which successful prosecution for child pornography may be even more difficult.

[13] One state committee studying the problem declared: "The act of selling these materials is guaranteeing that there will be additional abuse of children." Texas House Select Committee on Child Pornography: Its Related

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis.* We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary per-

---

Causes and Control 132 (1978). See also Commercial Exploitation 80 ("Printed materials cannot be isolated or removed from the process involved in developing them").

[14] In *Giboney*, a unanimous Court held that labor unions could be restrained from picketing a firm in support of a secondary boycott which a State had validly outlawed. In *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973), the Court allowed an injunction against a newspaper's furtherance of illegal sex discrimination by placing of job advertisements in gender-designated columns. The Court stated:

> "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.*, at 389.

[15] In this connection we note that 18 U. S. C. § 2251 (1976 ed., Supp. IV), making it a federal offense for anyone to use children under the age of 16 in the production of pornographic materials, embraces all "sexually explicit conduct" without imposing an obscenity test. In addition, half of the state laws imposing criminal liability on the producer do not require the visual material to be legally obscene. Use in Pornography 307–308.

formance or scientific or educational work. As a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized.[16] Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children.

Fifth. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. "The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech." *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 66 (1976) (opinion of STEVENS, J., joined by BURGER, C. J., and WHITE and REHNQUIST, JJ.). See also *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 742–748 (1978) (opinion of STEVENS, J., joined by BURGER, C. J., and REHNQUIST, J.). "[I]t is the content of [an] utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.'" *Young* v. *American Mini Theatres, Inc.*, *supra*, at 66. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Leaving aside the special considerations when public officials are the target, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), a libelous publication is not protected by the Constitution. *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952). Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

---

[16] 96 Misc. 2d, at 676, 409 N. Y. S. 2d, at 637. This is not merely a hypothetical possibility. See Brief for Petitioner 25 and examples cited therein.

C

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age.[17] The category of "sexual conduct" proscribed must also be suitably limited and described.

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant. *Smith* v. *California*, 361 U. S. 147 (1959); *Hamling* v. *United States*, 418 U. S. 87 (1974).

---

[17] Sixteen States define a child as a person under age 18. Four States define a child as under 17 years old. The federal law and 16 States, including New York, define a child as under 16. Illinois and Nebraska define a child as a person under age 16 or who appears as a prepubescent. Ill. Rev. Stat., ch. 38, ¶ 11–20a(a)(1)(A) (1979); Neb. Rev. Stat. § 28–1463 (1979). Indiana defines a child as one who is or appears to be under 16. Ind. Code. §§ 35–30–10.1–2, 35–30–10.1–3 (1979). Kentucky provides for two age classifications (16 and 18) and varies punishment according to the victim's age. Ky. Rev. Stat. §§ 531.300–531.370 (Supp. 1980). See Use in Pornography 307, n. 71 (collecting statutes).

D

Section 263.15's prohibition incorporates a definition of sexual conduct that comports with the above-stated principles. The forbidden acts to be depicted are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene: "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." § 263.00(3). The term "lewd exhibition of the genitals" is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation. 413 U. S., at 25. A performance is defined only to include live or visual depictions: "any play, motion picture, photograph or dance . . . [or] other visual representation exhibited before an audience." § 263.00(4). Section 263.15 expressly includes a scienter requirement.

We hold that § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection. It is therefore clear that there is nothing unconstitutionally "underinclusive" about a statute that singles out this category of material for proscription.[18] It also follows that the State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State.[19]

---

[18] *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975), relied upon by the Court of Appeals, struck down a law against drive-in theaters showing nude scenes if movies could be seen from a public place. Since nudity, without more is protected expression, *id.*, at 213, we proceeded to consider the underinclusiveness of the ordinance. The Jacksonville ordinance im-

III

It remains to address the claim that the New York statute is unconstitutionally overbroad because it would forbid the distribution of material with serious literary, scientific, or educational value or material which does not threaten the harms sought to be combated by the State. Respondent prevailed on that ground below, and it is to that issue that we now turn.

The New York Court of Appeals recognized that overbreadth scrutiny has been limited with respect to conduct-related regulation, *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), but it did not apply the test enunciated in *Broadrick* because the challenged statute, in its view, was directed at "pure speech." The court went on to find that § 263.15 was fatally overbroad: "[T]he statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a nonobscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts.

---

permissibly singled out movies with nudity for special treatment while failing to regulate other protected speech which created the same alleged risk to traffic. Today, we hold that child pornography as defined in § 263.15 is unprotected speech subject to content-based regulation. Hence, it cannot be underinclusive or unconstitutional for a State to do precisely that.

[19] It is often impossible to determine where such material is produced. The Senate Report accompanying federal child pornography legislation stressed that "it is quite common for photographs or films made in the United States to be sent to foreign countries to be reproduced and then returned to this country in order to give the impression of foreign origin." S. Rep. No. 95-438, p. 6 (1977). In addition, States have not limited their distribution laws to material produced within their own borders because the maintenance of the market itself "leaves open the financial conduit by which the production of such material is funded and materially increases the risk that [local] children will be injured." 52 N. Y. 2d 674, 688, 422 N. E. 2d 523, 531 (1981) (Jasen, J., dissenting).

Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose." 52 N. Y. 2d, at 678, 422 N. E. 2d, at 525.

While the construction that a state court gives a state statute is not a matter subject to our review, *Wainwright* v. *Stone*, 414 U. S. 21, 22–23 (1973); *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972), this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law. It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents, as well as state-court decisions giving the Constitution too little shrift. A state court is not free to avoid a proper facial attack on federal constitutional grounds. *Bigelow* v. *Virginia*, 421 U. S. 809, 817 (1975). By the same token, it should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution.

A

The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. *Broadrick* v. *Oklahoma*, *supra*, at 610; *United States* v. *Raines*, 362 U. S. 17, 21 (1960); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 513 (1937); *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219–220 (1912). In *Broadrick*, we recognized that this rule reflects two cardinal principles of our constitutional order: the personal nature of constitutional rights, *McGowan* v. *Maryland*, 366 U. S. 420, 429 (1961), and prudential limitations on constitutional adjudication.[20] In *United States* v. *Raines*, *supra*, at 21, we

---

[20] In addition to prudential restraints, the traditional rule is grounded in Art. III limits on the jurisdiction of federal courts to actual cases and controversies.

"This Court, as is the case with all federal courts, 'has no jurisdiction to noted the "incontrovertible proposition" that it "'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation,'" (quoting *Barrows* v. *Jackson*, 346 U. S. 249, 256 (1953)). By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule,[21] we face "flesh-and-blood"[22] legal problems with data "relevant and adequate to an informed judgment."[23] This practice also fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities.

What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by "weighty countervailing policies." *United States* v. *Raines*, *supra*, at 22–23. The doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Village of Schaumburg* v.

---

pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39." *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

[21] Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face. See, *e. g.*, *Terminiello* v. *City of Chicago*, 337 U. S. 1, 5 (1949). See generally Monaghan, Overbreadth, 1981 S. Ct. Rev. 1, 10–14.

[22] A. Bickel, The Least Dangerous Branch 115–116 (1962).

[23] Frankfurter & Hart, The Business of the Supreme Court at October Term, 1934, 49 Harv. L. Rev. 68, 95–96 (1935).

Citizens for a Better Environment, 444 U. S. 620, 634 (1980); *Gooding* v. *Wilson*, *supra*, at 521. It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity. *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965); *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940); *United States* v. *Raines*, *supra*, at 21–22; *Gooding* v. *Wilson*, *supra*, at 521.

The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." *Broadrick*, 413 U. S., at 613. We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face.[24]

---

[24] When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Accord, *e. g.*, *Haynes* v. *United States*, 390 U. S. 85, 92 (1968) (dictum); *Schneider* v. *Smith*, 390 U. S. 17, 27 (1968); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953); *Ashwander* v. *TVA*, 297 U. S. 288, 348 (1936) (Brandeis, J., concurring). Furthermore, if the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated. *United States* v. *Thirty-seven Photographs*, 402 U. S. 363 (1971).

A state court is also free to deal with a state statute in the same way. If the invalid reach of the law is cured, there is no longer reason for proscribing the statute's application to unprotected conduct. Here, of course, we are dealing with a state statute on direct review of a state-court decision that has construed the statute. Such a construction is binding on us.

In *Broadrick*, we explained the basis for this requirement:

> "[T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman* v. *United States*, 394 U. S. 165, 174–175 (1969)." *Id.*, at 615.

We accordingly held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ibid.*[25]

---

[25] *Parker* v. *Levy*, 417 U. S. 733, 760 (1974) ("This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .' *CSC* v. *Letter Carriers*, 413 U. S. 548, 580–581 (1973)"). See Bogen, First Amendment Ancillary Doctrines, 37 Md. L. Rev. 679, 712–714 (1978); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 860–861 (1970).

Broadrick examined a regulation involving restrictions on political campaign activity, an area not considered "pure speech," and thus it was unnecessary to consider the proper overbreadth test when a law arguably reaches traditional forms of expression such as books and films. As we intimated in *Broadrick*, the requirement of substantial overbreadth extended "at the very least" to cases involving conduct plus speech. This case, which poses the question squarely, convinces us that the rationale of *Broadrick* is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution.

The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel. On most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression.[26]

---

[26] In *Gooding* v. *Wilson*, 405 U. S. 518, 519, 527 (1972), the Court's invalidation of a Georgia statute making it a misdemeanor to use "'opprobrious words or abusive language, tending to cause a breach of the peace'" followed from state judicial decisions indicating that "merely to speak words offensive to some who hear them" could constitute a "breach of the peace." Cases invalidating laws requiring members of a "subversive organization" to take a loyalty oath, *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), or register with the government, *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), can be explained on the basis that the laws involved, unlike § 263.15, defined no central core of constitutionally regulable conduct; the entire scope of the laws was subject to the uncertainties and vagaries of prosecutorial discretion. See also *Bigelow* v. *Virginia*, 421 U. S. 809, 817 (1975) ("the facts of this case well illustrate 'the statute's potential for sweeping and improper applications'") (citation omitted); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963) ("We read the decree of the Virginia Supreme Court of Appeals . . . as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys"); *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940) (the statute "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press").

Indeed, JUSTICE BRENNAN observed in his dissenting opinion in *Broadrick:*

> "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine." *Id.*, at 630.

The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.[27] This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech. We see no appreciable difference between the position of a publisher or bookseller in doubt as to the reach of New York's child pornography law and the situation faced by the Oklahoma state employees with respect to that State's restriction on partisan political activity. Indeed, it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute's scope, may be less likely to be deterred than the employee who wishes to engage in political campaign activity. Cf. *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380–381 (1977) (overbreadth analysis inapplicable to commercial speech).

This requirement of substantial overbreadth may justifiably be applied to statutory challenges which arise in defense of a criminal prosecution as well as civil enforcement or actions seeking a declaratory judgment. Cf. *Parker* v. *Levy*, 417 U. S. 733, 760 (1974). Indeed, the Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Edwards* v. *South Carolina*, 372 U. S. 229 (1973). We recognize, however, that the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial. We simply hold that the fact that a criminal prohibition is involved does not obviate the need for the inquiry or *a priori* warrant a finding of substantial overbreadth.

---

[27] "A substantial overbreadth rule is implicit in the chilling effect rationale. . . . [T]he presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable." Moreover, "[w]ithout a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application." Note, 83 Harv. L. Rev., *supra* n. 25, at 859, and n. 61.

B

Applying these principles, we hold that § 263.15 is not substantially overbroad. We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. New York, as we have held, may constitutionally prohibit dissemination of material specified in § 263.15. While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of § 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, § 263.15 is "not substantially overbroad and . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick* v. *Oklahoma*, 413 U. S., at 615–616.

IV

Because § 263.15 is not substantially overbroad, it is unnecessary to consider its application to material that does not depict sexual conduct of a type that New York may restrict consistent with the First Amendment. As applied to Paul Ferber and to others who distribute similar material, the statute does not violate the First Amendment as applied to the States through the Fourteenth.[28] The judgment of the New York Court of Appeals is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BLACKMUN concurs in the result.

JUSTICE O'CONNOR, concurring.

Although I join the Court's opinion, I write separately to stress that the Court does not hold that New York must except "material with serious literary, scientific, or educational value," *ante*, at 766, from its statute. The Court merely holds that, even if the First Amendment shelters such material, New York's current statute is not sufficiently overbroad to support respondent's facial attack. The compelling interests identified in today's opinion, see *ante*, at 756–764, suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph "edifying" or "tasteless." The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm.

---

[28] There is no argument that the films sold by respondent do not fall squarely within the category of activity we have defined as unprotected. Therefore, no independent examination of the material is necessary to assure ourselves that the judgment here "does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285 (1964).

An exception for depictions of serious social value, moreover, would actually increase opportunities for the content-based censorship disfavored by the First Amendment. As drafted, New York's statute does not attempt to suppress the communication of particular ideas. The statute permits discussion of child sexuality, forbidding only attempts to render the "portrayal[s] somewhat more 'realistic' by utilizing or photographing children." *Ante*, at 763. Thus, the statute attempts to protect minors from abuse without attempting to restrict the expression of ideas by those who might use children as live models.

On the other hand, it is quite possible that New York's statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court. For example, clinical pictures of adolescent sexuality, such as those that might appear in medical textbooks, might not involve the type of sexual exploitation and abuse targeted by New York's statute. Nor might such depictions feed the poisonous "kiddie porn" market that New York and other States have attempted to regulate. Similarly, pictures of children engaged in rites widely approved by their cultures, such as those that might appear in issues of the National Geographic, might not trigger the compelling interests identified by the Court. It is not necessary to address these possibilities further today, however, because this potential overbreadth is not sufficiently substantial to warrant facial invalidation of New York's statute.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I agree with much of what is said in the Court's opinion. As I made clear in the opinion I delivered for the Court in

Ginsburg v. *New York*, 390 U. S. 629 (1968), the State has a special interest in protecting the well-being of its youth. *Id.*, at 638–641. See also *Globe Newspaper Co.* v. *Superior Court*, 457 U. S. 596, 607 (1982). This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material. *Ginsburg* v. *New York*, *supra*, at 637, 638, n. 6, 642–643, n. 10. See also *Jacobellis* v. *Ohio*, 378 U. S. 184, 195 (1964) (opinion of BRENNAN, J.). I also agree with the Court that the "tiny fraction," *ante*, at 773, of material of serious artistic, scientific, or educational value that could conceivably fall within the reach of the statute is insufficient to justify striking the statute on the grounds of overbreadth. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 630 (1973) (BRENNAN, J., dissenting).

But in my view application of § 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment. As the Court recognizes, the limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are of exceedingly "slight social value," and the State has a compelling interest in their regulation. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942). The First Amendment value of depictions of children that are in themselves serious contributions to art, literature, or science, is, by definition, simply not "*de minimis*." See *ante*, at 761. At the same time, the State's interest in suppression of such materials is likely to be far less compelling. For the Court's assumption of harm to the child resulting from the "permanent record" and "circulation" of the child's "participation," *ante*, at 759, lacks much of its force where the depiction is a serious contribution to art or science. The production of materials of serious value is not the "low-profile, clandestine industry" that according to the Court produces purely pornographic materials. See *ante*, at 760. In short, it is inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed "material outside the protection of the First Amendment." See *ante*, at 763.

I, of course, adhere to my view that, in the absence of exposure, or particular harm, to juveniles or unconsenting adults, the State lacks power to suppress sexually oriented materials. See, *e. g., Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting). With this understanding, I concur in the Court's judgment in this case.

JUSTICE STEVENS, concurring in the judgment.

Two propositions seem perfectly clear to me. First, the specific conduct that gave rise to this criminal prosecution is not protected by the Federal Constitution; second, the state statute that respondent violated prohibits some conduct that is protected by the First Amendment. The critical question, then, is whether this respondent, to whom the statute may be applied without violating the Constitution, may challenge the statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the Court. I agree with the Court's answer to this question but not with its method of analyzing the issue.

Before addressing that issue, I shall explain why respondent's conviction does not violate the Constitution. The two films that respondent sold contained nothing more than lewd exhibition; there is no claim that the films included any material that had literary, artistic, scientific, or educational value.[1] Respondent was a willing participant in a commercial market that the State of New York has a legitimate interest in suppressing. The character of the State's interest in protecting children from sexual abuse justifies the imposition of criminal sanctions against those who profit, directly or indirectly, from the promotion of such films. In this respect my evaluation of this case is different from the opinion I have expressed concerning the imposition of criminal sanctions for the promotion of obscenity in other contexts.[2]

---

[1] Respondent's counsel conceded at oral argument that a finding that the films are obscene would have been consistent with the *Miller* definition. Tr. of Oral Arg. 41.

A holding that respondent may be punished for selling these two films does not require us to conclude that other users of these very films, or that other motion pictures containing similar scenes, are beyond the pale of constitutional protection. Thus, the exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime. Moreover, it is at least conceivable that a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films and, when viewed as a whole in a proper setting, be entitled to constitutional protection. The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context.

The Court's holding that this respondent may not challenge New York's statute as overbroad follows its discussion of the contours of the category of nonobscene child pornography that New York may legitimately prohibit. Having defined that category in an abstract setting,[3] the Court makes the empirical judgment that the arguably impermissible application of the New York statute amounts to only a "tiny fraction of the materials within the statute's reach." *Ante*, at 773. Even assuming that the Court's empirical analysis is sound,[4] I believe a more conservative approach to the issue would adequately vindicate the State's interest in protecting its children and cause less harm to the federal interest in free expression.

---

[2] See *Burch* v. *Louisiana*, 441 U. S. 130, 139 (STEVENS, J., concurring); *Pinkus* v. *United States*, 436 U. S. 293, 305 (STEVENS, J., concurring); *Ballew* v. *Georgia*, 435 U. S. 223, 245 (STEVENS, J., concurring); *Smith* v. *United States*, 431 U. S. 291, 311–321 (STEVENS, J., dissenting); *Marks* v. *United States*, 430 U. S. 188, 198 (STEVENS, J., concurring in part and dissenting in part); see also *Schad* v. *Borough of Mount Ephraim*, 452 U. S. 61, 84 (STEVENS, J., concurring in judgment); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 750 (opinion of STEVENS, J.).

[3] "The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the aver-

A hypothetical example will illustrate my concern. Assume that the operator of a New York motion picture theater specializing in the exhibition of foreign feature films is offered a full-length movie containing one scene that is plainly lewd if viewed in isolation but that nevertheless is part of a serious work of art. If the child actor resided abroad, New York's interest in protecting its young from sexual exploitation would be far less compelling than in the case before us. The federal interest in free expression would, however, be just as strong as if an adult actor had been used. There are at least three different ways to deal with the statute's potential application to that sort of case.

First, at one extreme and as the Court appears to hold, the First Amendment inquiry might be limited to determining

---

age person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Ante*, at 764.

[4] The Court's analysis is directed entirely at the permissibility of the statute's coverage of nonobscene material. Its empirical evidence, however, is drawn substantially from congressional Committee Reports that ultimately reached the conclusion that a prohibition against *obscene* child pornography—coupled with sufficiently stiff sanctions—is an adequate response to this social problem. The Senate Committee on the Judiciary concluded that "virtually all of the materials that are normally considered child pornography are obscene under the current standards," and that "[i]n comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential." S. Rep. No. 95-438, p. 13 (1977); see also H. R. Rep. No. 95-696, pp. 7-8 (1977). The coverage of the federal statute is limited to obscene material. See 18 U. S. C. § 2252(a) (1976 ed., Supp. IV).

whether the offensive scene, viewed in isolation, is lewd. When the constitutional protection is narrowed in this drastic fashion, the Court is probably safe in concluding that only a tiny fraction of the materials covered by the New York statute is protected. And with respect to my hypothetical exhibitor of foreign films, he need have no uncertainty about the permissible application of the statute; for the one lewd scene would deprive the entire film of any constitutional protection.

Second, at the other extreme and as the New York Court of Appeals correctly perceived, the application of this Court's cases requiring that an obscenity determination be based on the artistic value of a production taken as a whole would afford the exhibitor constitutional protection and result in a holding that the statute is invalid because of its overbreadth. Under that approach, the rationale for invalidating the entire statute is premised on the concern that the exhibitor's understanding about its potential reach could cause him to engage in self-censorship. This Court's approach today substitutes broad, unambiguous, state-imposed censorship for the self-censorship that an overbroad statute might produce.

Third, as an intermediate position, I would refuse to apply overbreadth analysis for reasons unrelated to any prediction concerning the relative number of protected communications that the statute may prohibit. Specifically, I would postpone decision of my hypothetical case until it actually arises. Advocates of a liberal use of overbreadth analysis could object to such postponement on the ground that it creates the risk that the exhibitor's uncertainty may produce self-censorship. But that risk obviously interferes less with the interest in free expression than does an abstract, advance ruling that the film is simply unprotected whenever it contains a lewd scene, no matter how brief.

My reasons for avoiding overbreadth analysis in this case are more qualitative than quantitative. When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.

Moreover, it is probably safe to assume that the category of speech that is covered by the New York statute generally is of a lower quality than most other types of communication. On a number of occasions, I have expressed the view that the First Amendment affords some forms of speech more protection from governmental regulation than other forms of speech.[5] Today the Court accepts this view, putting the category of speech described in the New York statute in its rightful place near the bottom of this hierarchy. *Ante*, at 761–763. Although I disagree with the Court's position that such speech is totally without First Amendment protection, I agree that generally marginal speech does not warrant the extraordinary protection afforded by the overbreadth doctrine.[6]

Because I have no difficulty with the statute's application in this case, I concur in the Court's judgment.

---

[5] See, *e. g., Schad* v. *Borough of Mount Ephraim*, 452 U. S., at 80, 83 (STEVENS, J., concurring in judgment); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 544–548 (STEVENS, J., concurring in judgment); *FCC* v. *Pacifica Foundation*, 438 U. S., at 744–748 (opinion of STEVENS, J.); *Carey* v. *Population Services International*, 431 U. S. 678, 716–717 (STEVENS, J., concurring in part and concurring in judgment); *Smith* v. *United States*, 431 U. S., at 317–319 (STEVENS, J., dissenting); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 66–71 (opinion of STEVENS, J.).

[6] See *FCC* v. *Pacifica Foundation, supra*, at 742–743 (opinion of STEVENS, J.); *Young* v. *American Mini Theatres, Inc., supra*, at 59–61; see also *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 544–548 (STEVENS, J., dissenting in part); *Schad* v. *Borough of Mount Ephraim, supra*, at 85 (STEVENS, J., concurring in judgment).

ENMUND *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 81-5321. Argued March 23, 1982—Decided July 2, 1982

Petitioner and a codefendant, at a jury trial in a Florida court, were convicted of first-degree murder and robbery of two elderly persons at their farmhouse, and were sentenced to death. The Florida Supreme Court affirmed. The court held that, although the record supported no more than the inference that petitioner was the person in a car parked by the side of the road near the farmhouse at the time of the killings waiting to help the robbers and killers (the codefendant and another) escape, this was enough under Florida law to make petitioner a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to petitioner's challenge to the death sentence that he did not himself kill and was not present at the killings, or whether he intended that the victims be killed or anticipated that lethal force might be used to effectuate the robbery or escape.

Held: The imposition of the death penalty upon petitioner is inconsistent with the Eighth and Fourteenth Amendments. Pp. 788-801.

(a) The current judgments of legislatures, juries, and prosecutors weigh heavily on the side of rejecting capital punishment for the crime at issue. Only a small minority of States—eight—allow the death penalty to be imposed solely because the defendant somehow participated in the robbery in the course of which a murder was committed, but did not take or attempt or intend to take life, or intend that lethal force be employed. And the evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's, the statistics demonstrating that juries—and perhaps prosecutors—consider death a disproportionate penalty for those who fall within petitioner's category. Pp. 788-796.

(b) While robbery is a serious crime deserving serious punishment, it is not a crime "so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg* v. *Georgia*, 428 U. S. 153, 184. The death penalty, which is "unique in its severity and irrevocability," *id.*, at 187, is an excessive penalty for the robber, who, as such, does not take human life. Here, the focus must be on petitioner's culpability, not on those who committed the robbery and killings. He did not kill or intend to kill and thus his culpability is different from that of the robbers who killed, and it is impermissible for the State to treat them alike and attribute to petitioner the culpability of those who killed the victims. Pp. 797–798.

(c) Neither deterrence of capital crimes nor retribution is a sufficient justification for executing petitioner. It is unlikely that the threat of the death penalty for murder will measurably deter one such as petitioner who does not kill or intend to kill. As to retribution, this depends on the degree of petitioner's culpability, which must be limited to his participation in the robbery. Putting him to death to avenge two killings that he did not commit or intend to commit or cause would not measurably contribute to the retribution end of ensuring that the criminal gets his just deserts. Pp. 798–801.

399 So. 2d 1362, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 801. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 801.

James S. Liebman argued the cause *pro hac vice* for petitioner. With him on the briefs were *William C. McLain*, *Jack Greenberg*, *James M. Nabrit III*, *Joel Berger*, *John Charles Boger*, *Deborah Fins*, and *Anthony G. Amsterdam*.

Lawrence A. Kaden, Assistant Attorney General of Florida, argued the cause *pro hac vice* for respondent. With him on the brief were *Jim Smith*, Attorney General, and *George R. Georgieff* and *Raymond L. Marky*, Assistant Attorneys General.*

JUSTICE WHITE delivered the opinion of the Court.

I

The facts of this case, taken principally from the opinion of the Florida Supreme Court, are as follows. On April 1,

---

Daniel J. Popeo, *Paul D. Kamenar*, and *Nicholas E. Calio* filed a brief for the Washington Legal Foundation as *amicus curiae* urging affirmance.

Robert K. Corbin, Attorney General of Arizona, *William J. Schaffer III*, and *Bruce Ferg*, Assistant Attorneys General, filed a brief for the States of Arizona et al. as *amici curiae*.

1975, at approximately 7:45 a. m., Thomas and Eunice Kersey, aged 86 and 74, were robbed and fatally shot at their farmhouse in central Florida. The evidence showed that Sampson and Jeanette Armstrong had gone to the back door of the Kersey house and asked for water for an overheated car. When Mr. Kersey came out of the house, Sampson Armstrong grabbed him, pointed a gun at him, and told Jeanette Armstrong to take his money. Mr. Kersey cried for help, and his wife came out of the house with a gun and shot Jeanette Armstrong, wounding her. Sampson Armstrong, and perhaps Jeanette Armstrong, then shot and killed both of the Kerseys, dragged them into the kitchen, and took their money and fled.

Two witnesses testified that they drove past the Kersey house between 7:30 and 7:40 a. m. and saw a large cream- or yellow-colored car parked beside the road about 200 yards from the house and that a man was sitting in the car. Another witness testified that at approximately 6:45 a. m. he saw Ida Jean Shaw, petitioner's common-law wife and Jeanette Armstrong's mother, driving a yellow Buick with a vinyl top which belonged to her and petitioner Earl Enmund. Enmund was a passenger in the car along with an unidentified woman. At about 8 a. m. the same witness saw the car return at a high rate of speed. Enmund was driving, Ida Jean Shaw was in the front seat, and one of the other two people in the car was lying down across the back seat.

Enmund, Sampson Armstrong, and Jeanette Armstrong were indicted for the first-degree murder and robbery of the Kerseys. Enmund and Sampson Armstrong were tried together.[1] The prosecutor maintained in his closing argument that "Sampson Armstrong killed the old people." Record 1577. The judge instructed the jury that "[t]he killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill." App. 6. He went on to instruct them that

---

[1] Jeanette Armstrong's trial was severed and she was convicted of two counts of second-degree murder and one count of robbery and sentenced to three consecutive life sentences. 399 So. 2d 1362, 1371 (Fla. 1981).

> "[i]n order to sustain a conviction of first degree murder while engaging in the perpetration of or in the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery." *Id.*, at 9.

The jury found both Enmund and Sampson Armstrong guilty of two counts of first-degree murder and one count of robbery. A separate sentencing hearing was held and the jury recommended the death penalty for both defendants under the Florida procedure whereby the jury advises the trial judge whether to impose the death penalty. See Fla. Stat. § 921.141(2) (1981). The trial judge then sentenced Enmund to death on the two counts of first-degree murder. Enmund appealed, and the Florida Supreme Court remanded for written findings as required by Fla. Stat. § 921.141(3) (1981). The trial judge found four statutory aggravating circumstances: the capital felony was committed while Enmund was engaged in or was an accomplice in the commission of an armed robbery, Fla. Stat. § 921.141(5)(d) (1981); the capital felony was committed for pecuniary gain, § 921.141(5)(f); it was especially heinous, atrocious, or cruel, § 921.141(5)(h); and Enmund was previously convicted of a felony involving the use or threat of violence, § 921.141(5)(b). 399 So. 2d 1362, 1371–1372 (Fla. 1981). The court found that "*none* of the statutory mitigating circumstances applied" to Enmund and that the aggravating circumstances outweighed the mitigating circumstances. *Id.*, at 1372. Enmund was therefore sentenced to death on each of the murder counts.

The Florida Supreme Court affirmed Enmund's conviction and sentences. It found that "[t]here was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered." *Id.*, at 1370. However, it rejected petitioner's argument that at most he could be found guilty of second-degree murder under Florida's felony-murder rule. The court explained that the interaction of the "'felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon.'" *Id.*, at 1369, quoting *Adams* v. *State*, 341 So. 2d 765, 768–769 (Fla. 1976), cert. denied, 434 U. S. 878 (1977). Although petitioner could be convicted of second-degree murder only if he were an accessory before the fact rather than a principal, the Florida Supreme Court reasoned:

> "[T]he only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of section 782.04(1)(a)." 399 So. 2d, at 1370.[2]

---

[2] The Florida Supreme Court's understanding of the evidence differed sharply from that of the trial court with respect to the degree of Enmund's participation. In its sentencing findings, the trial court concluded that Enmund was a major participant in the robbery because he planned the robbery in advance and himself shot the Kerseys. 399 So. 2d, at 1372. Both of these findings, as we understand it, were rejected by the Florida Supreme Court's holding that the only supportable inference with respect to Enmund's participation was that he drove the getaway car. The dissent, while conceding that this holding negated the finding that Enmund

The State Supreme Court rejected two of the four statutory aggravating circumstances found by the trial court. It held that the findings that the murders were committed in the course of a robbery and that they were committed for pecuniary gain referred to the same aspect of petitioner's crime and must be treated as only one aggravating circumstance. *Id.*, at 1373. In addition, the court held that "[t]he recited circumstance, that the murders were especially heinous, atrocious, and cruel, cannot be approved." *Ibid.*, citing *Armstrong* v. *State*, 399 So. 2d 953 (Fla. 1981).[3] However, because there were two aggravating circumstances and no mitigating circumstances, the death sentence was affirmed. In so doing, the court expressly rejected Enmund's submission that because the evidence did not establish that he intended to take life, the death penalty was barred by the Eighth Amendment of the United States Constitution. 399 So. 2d, at 1371.

We granted Enmund's petition for certiorari, 454 U. S. 939 (1981), presenting the question whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life.[4]

---

was one of the triggermen, argues that the trial court's finding that Enmund planned the robbery was implicitly affirmed. *Post*, at 809. As we have said, we disagree with that view. In any event, the question is irrelevant to the constitutional issue before us, since the Florida Supreme Court held that driving the escape car was enough to warrant conviction and the death penalty, whether or not Enmund intended that life be taken or anticipated that lethal force would be used.

[3] In *Armstrong* the Florida Supreme Court rejected the trial court's conclusion that the Kerseys had been killed in order to eliminate them as witnesses, and stated that according to the only direct account of the events, "the shootings were indeed spontaneous and were precipitated by the armed resistance of Mrs. Kersey." 399 So. 2d, at 963.

[4] The petitioner argues a second question: whether the degree of Enmund's participation in the killings was given the consideration required by the Eighth and Fourteenth Amendments. We need not deal with this question.

II

As recounted above, the Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments.

A

The Cruel and Unusual Punishments Clause of the Eighth Amendment is directed, in part, "'against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" *Weems* v. *United States*, 217 U. S. 349, 371 (1910), quoting *O'Neil* v. *Vermont*, 144 U. S. 323, 339–340 (1892) (Field, J., dissenting). This Court most recently held a punishment excessive in relation to the crime charged in *Coker* v. *Georgia*, 433 U. S. 584 (1977). There the plurality opinion concluded that the imposition of the death penalty for the rape of an adult woman "is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.*, at 592. In reaching this conclusion, it was stressed that our judgment "should be informed by objective factors to the maximum possible extent." *Ibid.* Accordingly, the Court looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter. We proceed to analyze the punishment at issue in this case in a similar manner.

B

The *Coker* plurality observed that "[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape." *Id.*, at 593. More importantly, in reenacting death penalty laws in order to satisfy the criteria established in *Furman* v. *Georgia*, 408 U. S. 238 (1972), only three States provided the death penalty for the rape of an adult woman in their revised statutes. 433 U. S., at 594. The plurality therefore concluded that "[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." *Id.*, at 596 (footnote omitted).

Thirty-six state and federal jurisdictions presently authorize the death penalty. Of these, only eight jurisdictions authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life.[5] Of the remaining 28 jurisdictions, in 4 felony murder is not a capital crime.[6] Eleven States require some culpable mental state with respect to the homicide as a prerequisite to conviction of a crime for which the death penalty is authorized. Of these 11 States, 8 make knowing, intentional, purposeful, or premeditated killing an element of capital murder.[7] Three other States require proof of a culpable mental state short of intent, such as recklessness or extreme indifference to human life, before the death penalty may be imposed.[8] In these 11 States, therefore, the actors in a felony murder are not subject to the death penalty without proof of their mental state, proof which was not required with respect to Enmund either under the trial court's instructions or under the law announced by the Florida Supreme Court.

---

[5] Cal. Penal Code Ann. §§ 189, 190.2(a)(17) (West Supp. 1982); Fla. Stat. §§ 782.04(1)(a), 775.082(1), 921.141(5)(d) (1981); Ga. Code §§ 26–1101(b), (c), 27–2534.1(b)(2) (1978); Miss. Code Ann. §§ 97–3–19(2)(e), 99–19–101(5)(d) (Supp. 1981); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4), 200.033(4) (1981); S. C. Code §§ 16–3–10, 16–3–20(C)(a)(1) (1976 and Supp. 1981); Tenn. Code Ann. §§ 39–2402(a), 39–2404(i)(7) (Supp. 1981); Wyo. Stat. §§ 6–4–101, 6–4–102(h)(iv) (1977).

[6] Mo. Rev. Stat. §§ 565.001, 565.003, 565.008(2) (1978) (death penalty may be imposed only for capital murder; felony murder is first-degree murder); N. H. Rev. Stat. Ann. §§ 630:1, 630:1(III), 630:1–a(I)(b)(2) (1974 and Supp. 1981) (capital murder includes only killing a law enforcement officer, killing during a kidnaping, and murder for hire); 18 Pa. Cons. Stat. §§ 2502(a), (b), 1102 (1980) (death penalty may be imposed only for first-degree murder; felony murder is second-degree murder); Wash. Rev. Code §§ 9A.32.030, 10.95.020 (1981) (death penalty may be imposed only for premeditated killing).

---

[7] Ala. Code §§ 13A-2-23, 13A-5-40(a)(2), 13A-6-2(a)(1) (1977 and Supp. 1982) (to be found guilty of capital murder, accomplice must have had "intent to promote or assist the commission of the offense" and murder must be intentional); Ill. Rev. Stat., ch. 38, ¶¶ 9-1(a)(3), 9-1(b)(6) (1979) (capital crime only if defendant killed intentionally or with knowledge that his actions "created a strong probability of death or great bodily harm"); La. Rev. Stat. Ann. § 14:30(1) (West Supp. 1982) ("specific intent to kill"); N. M. Stat. Ann. §§ 30-2-1(A)(2), 31-18-14(A), 31-20A-5 (Supp. 1981) (felony murder is a capital crime but death penalty may not be imposed absent intent to kill unless victim was a peace officer); Ohio Rev. Code Ann. §§ 2903.01(B), (C), (D), 2929.02(A), 2929.04(A)(7) (1982) (accomplice not guilty of capital murder unless he intended to kill); Tex. Penal Code Ann. §§ 19.02(a), 19.03(a)(2) (1974) ("intentionally commits the murder in the course of [a felony]"); Utah Code Ann. § 76-5-202(1) (1978) ("intentionally or knowingly causes the death of another"); Va. Code § 18.2-31(d) (1982) ("willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon").

[8] Ark. Stat. Ann. § 41-1501(1)(a) (1977) ("extreme indifference to . . . life"); see also § 41-1501, Commentary ("an inadvertent killing in the course of a felony will not . . . support . . . a conviction entailing punishment by death"); Del. Code Ann., Tit. 11, §§ 636(a)(2), (6) (1979) ("recklessly" or "with criminal negligence" causes death during the commission of a felony); Ky. Rev. Stat. § 507.020(1)(b) (Supp. 1980) (defendant must manifest "extreme indifference to human life" and "wantonly engag[e] in conduct which creates a grave risk of death . . . and thereby causes . . . death"); see also Commentary following Criminal Law of Kentucky Annotated, Penal Code § 507.020, p. 677 (1978) (each accomplice's "participation in [the] felony" must "constitut[e] wantonness manifesting extreme indifference to human life").

Four additional jurisdictions do not permit a defendant such as Enmund to be put to death. Of these, one State flatly prohibits capital punishment in cases where the defendant did not actually commit murder.[9] Two jurisdictions preclude the death penalty in cases such as this one where the defendant "was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution."[10] One other State limits the death penalty in felony murders to narrow circumstances not involved here.[11]

Nine of the remaining States deal with the imposition of the death penalty for a vicarious felony murder in their capital sentencing statutes. In each of these States, a defendant may not be executed *solely* for participating in a felony in which a person was killed if the defendant did not actually cause the victim's death. For a defendant to be executed in these States, typically the statutory aggravating circumstances which are present must outweigh mitigating factors. To be sure, a vicarious felony murderer may be sentenced to death in these jurisdictions absent an intent to kill if sufficient aggravating circumstances are present. However, six of these nine States make it a statutory *mitigating* circumstance that the defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor.[12] By making minimal participation in a capital felony committed by another person a mitigating circumstance, these sentencing statutes reduce the likelihood that a person will be executed for vicarious felony murder. The remaining three jurisdictions exclude felony murder from their lists of aggravating circumstances that will support a death sentence.[13] In each of these nine States, a nontriggerman guilty of felony murder cannot be sentenced to death for the felony murder absent aggravating circumstances above and beyond the felony murder itself.

---

[9] Md. Code Ann., Art. 27, §§ 410, 412(b), 413(d)(10), 413(e)(1) (1982) (except in cases of murder for hire, only principal in the first degree subject to the death penalty). In addition, two jurisdictions already accounted for in n. 7, *supra*, also preclude the death penalty where the defendant did not commit the murder. Ill. Rev. Stat., ch. 38, ¶¶ 9-1(a)(3), 9-1(b)(6) (1979) (defendant must actually kill victim); Va. Code §§ 18.2-31(d), 18.2-10(a), 18.2-18 (1982) (except in cases of murder for hire, only principal in the first degree may be tried for capital murder).

[10] Colo. Rev. Stat. § 16-11-103(5)(d) (1978); 49 U. S. C. § 1473(c)(6)(D) (same).

[11] Vt. Stat. Ann., Tit. 13, §§ 2303(b), (c) (Supp. 1981) (capital murder reserved for offenders who commit a second unrelated murder or murder of a correctional officer).

Thus only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed. Even if the nine States are included where such a defendant could be executed for an unintended felony murder if sufficient aggravating circumstances are present to outweigh mitigating circumstances—which often include the defendant's minimal participation in the murder—only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die. Moreover, of the eight States which have enacted new death penalty statutes since 1978, none authorize capital punishment in such circumstances.[14] While the current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither "wholly unanimous among state legislatures," *Coker* v. *Georgia*, 433 U. S., at 596, nor as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue.[15]

---

[12] Ariz. Rev. Stat. Ann. § 13–703(G)(3) (Supp. 1981–1982) ("relatively minor" participation); Conn. Gen. Stat. § 53a–46a(f)(4) (Supp. 1982) (same); Ind. Code § 35–50–2–9(c)(4) (Supp. 1981) (same); Mont. Code Ann. § 46–18–304(6) (1981) (same); Neb. Rev. Stat. § 29–2523(2)(e) (1979) (same); N. C. Gen. Stat. § 15A–2000(f)(4) (Supp. 1981) (same).

[13] Idaho Code § 19–2515(f) (1979); Okla. Stat., Tit. 21, § 701.12 (1981); S. D. Comp. Laws Ann. § 23A–27A–1 (Supp. 1981).

[14] See the Ala., Colo., Conn., Md., Ohio, Pa., S. D., and Wash. statutes cited in nn. 5–7, 9, 10, 12, and 13, *supra*.

---

[15] The dissent characterizes the state statutes somewhat differently. It begins by noting that 31 States "authorize a sentencer to impose a death sentence for a death that occurs during the course of a robbery." *Post*, at 819. That is not relevant to this case, however. Rather, at issue is the number of States which authorize the death penalty where the defendant did not kill, attempt to kill, or intend to kill. The dissent divides the statutes into three categories. Its first category of 20 statutes include 8 about which there is no disagreement—Cal., Fla., Ga., Miss., Nev., S. C., Tenn., and Wyo. In 11 other States listed by the dissent—Ariz., Colo., Conn., Idaho, Ind., Mont., Neb., N. M., N. C., Okla., and S. D.—the dissent looks solely at the provisions defining the *crime* of capital murder. Colorado's capital sentencing statute makes a defendant's minimal participation in a murder an absolute defense to imposition of the death penalty. See n. 10, *supra*. Contrary to the dissent's claim that this provision would have been of no help to petitioner, see *post*, at 820, n. 36, if the case is judged on the basis of the Florida Supreme Court's findings, see n. 2, *supra*, Colorado law may well have barred imposition of the death penalty in this case. Similarly, the Ariz., Conn., Ind., Mont., Neb., and N. C. capital sentencing statutes do not permit capital punishment solely for vicarious felony murder and reduce the likelihood that the death penalty will be imposed on a vicarious felony murderer, even where aggravating circumstances are present, by making a defendant's minimal participation in the homicide a mitigating circumstance. See n. 12, *supra*. Three other States—Idaho, Okla., and S. D.—allow a defendant who does not intend to kill or actually kill to be executed only where other aggravating circumstances are present, and in those States the felony murder itself cannot serve as an aggravating circumstance. See n. 13, *supra*. New Mexico's capital sentencing statute requires the jury to find at least one statutory aggravating circumstance before the death penalty may be imposed, and in addition aggravating circumstances must outweigh mitigating circumstances. N. M. Stat. Ann. §§ 31-20A-4(C)(1) and (2) (Supp. 1981). The statute lists seven statutory aggravating circumstances, six of which require an intent to kill. §§ 31-20A-5(B)-(G). The only aggravating circumstance which does not

C

Society's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made. As we have previously observed, "'[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.'" *Coker* v. *Georgia*, *supra*, at 596, quoting *Gregg* v. *Georgia*, 428 U. S. 153, 181 (1976). The evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's. First, according to the petitioner, a search of all reported appellate court decisions since 1954 in cases where a defendant was executed for homicide shows that of the 362 executions, in 339 the person executed personally committed a homicidal assault.[16] In 2 cases the person executed had another person commit the homicide for him, and in 16 cases the facts were not reported in sufficient detail to determine whether the person executed committed the homicide.[17] The survey revealed only 6 cases out of 362 where a nontriggerman felony murderer was executed. All six executions took place in

---

include an intent element is not applicable here, for it requires that the victim must be "a peace officer who was acting in the lawful discharge of an official duty when he was murdered." § 31-20A-5(A). The remaining State, Vermont, limits the death penalty to narrow circumstances not present here. See n. 11, *supra*.

There is no disagreement that three States require a culpable mental state short of intent before a nontriggerman may be put to death, compare n. 8, *supra*, with *post*, at 821, n. 37, a mental state which Enmund was not proved to possess. Similarly, the dissent's second category of seven States which authorize the death penalty only if the defendant had specific intent to kill the victim differs from our group of specific-intent States only because we include New Mexico in that group. Compare n. 7, *supra*, with *post*, at 821–822, n. 38. Finally, there is no disagreement that three States restrict application of the death penalty to felony murderers who actually kill. Compare n. 9, *supra*, with *post*, at 822, n. 39.

[16] See App. D to Brief for Petitioner.

[17] There is no reason to believe that this group of 16 contains a higher proportion of nontriggermen than does the rest of the defendants studied.

1955. By contrast, there were 72 executions for rape in this country between 1955 and this Court's decision in *Coker* v. *Georgia* in 1977.[18]

That juries have rejected the death penalty in cases such as this one where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder is also shown by petitioner's survey of the Nation's death-row population.[19] As of October 1, 1981, there were 796 inmates under sentences of death for homicide. Of the 739 for whom sufficient data are available, only 41 did not participate in the fatal assault on the victim. Of the 40 among the 41 for whom sufficient information was available, only 16 were not physically present when the fatal assault was committed. These 16 prisoners included only 3, including petitioner, who were sentenced to die absent a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim. The figures for Florida are similar.[20] Forty-five felony murderers are currently on death row. The Florida Supreme Court either found or affirmed a trial court or jury finding that the defendant intended life to be taken in 36 cases. In eight cases the courts made no finding with respect to intent, but the defendant was the triggerman in each case. In only one case—Enmund's—there was no finding of an intent to kill and the defendant was not the triggerman.[21]

---

[18] See NAACP Legal Defense and Educational Fund, Inc., Death Row U. S. A. 1, n. * (Oct. 20, 1981).

[19] See App. E to Brief for Petitioner; NAACP Legal Defense and Educational Fund, Inc., Death Row U. S. A. (Oct. 20, 1981).

[20] See App. to Reply Brief for Petitioner A-1—A-7.

[21] These statistics concerning the number of vicarious felony murderers who have been executed and the number of them on death row are consistent with the findings of a study of 111 cases in which the defendant was found guilty of a capital crime and hence could have received the death penalty. Kalven & Zeisel, The American Jury and the Death Penalty, 33 U. Chi. L. Rev. 769 (1966). The authors found that juries rebel "at imposing the death penalty for the vicarious criminal responsibility of the defend-

The State does not challenge this analysis of the Florida cases.

The dissent criticizes these statistics on the ground that they do not reveal the percentage of homicides that were charged as felony murders or the percentage of cases where the State sought the death penalty for an accomplice guilty of felony murder. *Post*, at 818–819. We doubt whether it is possible to gather such information, and at any rate, it would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder. The fact remains that we are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed, and that only three persons in that category are presently sentenced to die. Nor can these figures be discounted by attributing to petitioner the argument that "death is an unconstitutional penalty absent an intent to kill," *post*, at 819, and observing that the statistics are incomplete with respect to intent. Petitioner's argument is that because he did not kill, attempt to kill, *and* he did not intend to kill, the death penalty is disproportionate as applied to him, and the statistics he cites are adequately tailored to demonstrate that juries—and perhaps prosecutors as well—consider death a disproportionate penalty for those who fall within his category.[22]

---

ant," *id.*, at 776, to the extent that felony murder and accomplice factors accounted for more jury decisions not to impose the death penalty when the trial judge decided to impose the death penalty than any other factor. *Id.*, at 777. The authors had anticipated that "because of the rigidity of the felony murder rule, the jury's sense of equity would produce a broad area of disagreement." *Id.*, at 776, n. 10. However, they found that "disagreement over the rule emerges only at the level of the death penalty." *Ibid.*

[22] "[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." *Coker* v. *Georgia*, 433 U. S. 584, 596, n. 10 (1977). It is thus

III

Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

We have no doubt that robbery is a serious crime deserving serious punishment. It is not, however, a crime "so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg* v. *Georgia*, 428 U. S., at 184 (footnote omitted). "[I]t does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, [robbery] by definition does not include the death of or even the serious injury to another person. The murderer kills; the [robber], if no more than that, does not. Life is over for the victim of the murderer; for the [robbery] victim, life . . . is not over and normally is not beyond repair." *Coker* v. *Georgia*, 433 U. S., at 598 (footnote omitted). As was said of the crime of rape in *Coker*, we have the abiding conviction that the death penalty, which is "unique in its severity and irrevocability," *Gregg* v. *Georgia*, *supra*, at 187, is an excessive penalty for the robber who, as such, does not take human life.

---

worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe. ALI, Model Penal Code § 210.2, pp. 39–40 (Off. Draft and Revised Comments 1980) (hereafter Model Penal Code). It is also relevant that death sentences have not infrequently been commuted to terms of imprisonment on the grounds of the defendant's lack of premeditation and limited participation in the homicidal act. See Wolfgang, Kelly, & Nolde, Comparison of the Executed and Commuted Among Admissions to Death Row, 53 J. Crim. L. C. & P. S. 301, 310 (1962).

Here the robbers did commit murder; but they were subjected to the death penalty only because they killed as well as robbed. The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976). Enmund himself did not kill or attempt to kill; and, as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

In *Gregg* v. *Georgia* the opinion announcing the judgment observed that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." 428 U. S., at 183 (footnote omitted). Unless the death penalty when applied to those in Enmund's position measurably contributes to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment. *Coker* v. *Georgia*, *supra*, at 592. We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher* v. *United States*, 328 U. S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg* v. *Georgia*, *supra*, at 186 (footnote omitted).

It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony. But competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself. Model Penal Code § 210.2, Comment, p. 38, and n. 96. This conclusion was based on three comparisons of robbery statistics, each of which showed that only about one-half of one percent of robberies resulted in homicide.[23] The most recent national

---

[23] The statistics relied upon by the American Law Institute may be summarized as follows:

Date & Location	*No. of Robberies*	*Robberies Accompanied by Homicide*	*%*
Cook County, Ill. 1926–1927	14,392 (est.)	71	.49
Philadelphia, Pa. 1948–1952	6,432	38	.59
New Jersey 1975	16,273	66	.41

Model Penal Code § 210.2, Comment, p. 38, n. 96.

crime statistics strongly support this conclusion.[24] In addition to the evidence that killings only rarely occur during robberies is the fact, already noted, that however often death occurs in the course of a felony such as robbery, the death penalty is rarely imposed on one only vicariously guilty of the murder, a fact which further attenuates its possible utility as an effective deterrence.

As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to "the degree of [his] criminal culpability," *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing. In *Robinson* v. *California*, 370 U. S. 660, 667 (1962), a statute making narcotics addiction a crime, even though such addiction "is apparently an illness which may be contracted innocently or involuntarily," was struck down under the Eighth Amendment. Similarly, in *Weems* v. *United States*, the Court invalidated a statute making it a crime for a public official to make a false entry in a public record but not requiring the offender to "injur[e] any one by his act or inten[d] to injure any one." 217 U. S., at 363. The Court employed a similar approach in *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder."

---

[24] An estimated total of 548,809 robberies occurred in the United States in 1980. U. S. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reports 17 (1981). Approximately 2,361 persons were murdered in the United States in 1980 in connection with robberies, *id.*, at 13, and thus only about 0.43% of robberies in the United States in 1980 resulted in homicide. See also Cook, The Effect of Gun Availability on Robbery and Robbery Murder, in 3 R. Haveman & B. Zellner, Policy Studies Review Annual 743, 747 (1980) (0.48% of all robberies result in murder).

For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.

IV

Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BRENNAN, concurring.

I join the Court's opinion. However, I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (dissenting opinion).

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

Today the Court holds that the Eighth Amendment prohibits a State from executing a convicted felony murderer. I dissent from this holding not only because I believe that it is not supported by the analysis in our previous cases, but also because today's holding interferes with state criteria for assessing legal guilt by recasting intent as a matter of federal constitutional law.

I

The evidence at trial showed that at approximately 7:30 a. m. on April 1, 1975, Sampson and Jeanette Armstrong approached the back door of Thomas and Eunice Kersey's farmhouse on the pretext of obtaining water for their overheated car.[1] When Thomas Kersey retrieved a water jug to help the Armstrongs, Sampson Armstrong grabbed him, held a gun to him, and told Jeanette Armstrong to take his wallet. Hearing her husband's cries for help, Eunice Kersey came around the side of the house with a gun and shot Jeanette Armstrong. Sampson Armstrong, and perhaps Jeanette Armstrong, returned the fire, killing both of the Kerseys.[2] The Armstrongs dragged the bodies into the kitchen, took Thomas Kersey's money, and fled to a nearby car, where the petitioner, Earl Enmund, was waiting to help the Armstrongs escape. Record 1348–1351.[3]

Ida Jean Shaw[4] testified that on March 31 the petitioner and the two Armstrongs were staying at her house. When she awoke on April 1, the day of the murders, the petitioner,

---

[1] Much of the evidence concerning these crimes came from J. B. Neal, to whom Sampson Armstrong made numerous admissions on the day of the murders. See Record 1344–1365.

[2] J. B. Neal testified that Armstrong had told him that two guns were involved; Jeanette had one and Sampson had the other. *Id.*, at 1354.

[3] An autopsy revealed that Mr. Kersey had been shot twice, once with a .38-caliber bullet, and once with a .22-caliber bullet. Mrs. Kersey had been shot six times; of the bullets that could be identified, two were fired from a .38-caliber gun, and one from a .22-caliber gun. According to a firearms expert, the .22-caliber bullets were fired from the same gun, and the .38-caliber bullets were fired from the same gun. See 399 So. 2d 1362, 1364 (Fla. 1981).

[4] Ida Jean Shaw was the petitioner's common-law wife and Jeanette Armstrong's mother. She was later given immunity from prosecution in return for her testimony. Record 1178–1179.

Jeanette, and Sampson, as well as Shaw's 1969 yellow Buick, were gone. *Id.*, at 1185–1186. A little after eight o'clock, either the petitioner or Sampson Armstrong entered the house and told her that Jeanette had been shot. *Id.*, at 1187–1188. After learning that Jeanette had been shot during a robbery, Shaw asked the petitioner "[w]hy he did it." Enmund answered that he had decided to rob Thomas Kersey after he had seen Kersey's money a few weeks earlier. *Id.*, at 1205.[5] At the same time, Sampson Armstrong volunteered that he had made sure that the Kerseys were dead. *Id.*, at 1207–1208.

Ida Jean Shaw also testified that, pursuant to the petitioner's and Sampson Armstrong's instructions, she had disposed of a .22-caliber pistol that she normally kept in her car, as well as a .38-caliber pistol belonging to the Armstrongs. *Id.*, at 1198–1202. The murder weapons were never recovered.[6]

In his closing argument, the prosecutor did not argue that Earl Enmund had killed the Kerseys. Instead, he maintained that the petitioner had initiated and planned the armed robbery, and was in the car during the killings. According to the prosecutor, "Sampson Armstrong killed the old people." *Id.*, at 1577.[7]

---

[5] Thomas Kersey normally kept large sums of money in his wallet and indiscriminately showed the cash to people he dealt with. A few weeks before his murder, Kersey revealed the contents of his wallet to the petitioner and bragged that at any time he could "dig up $15,000, $16,000." 399 So. 2d, at 1365. See Record 1205–1206.

[6] Ida Jean Shaw's trial testimony contradicted her earlier statements to police. When police initially questioned her, she insisted that Jeanette had been shot by an unknown assailant while she and Jeanette had been traveling to a nearby town. *Id.*, at 1191–1192. Later she gave investigators a statement implicating the petitioner and Sampson Armstrong in the murders. *Id.*, at 1209–1210. Subsequently, she gave two more statements repudiating the statement implicating the petitioner. *Id.*, at 1208–1209.

In his closing argument, the prosecutor acknowledged the conflict between Ida Jean Shaw's testimony that she was not in the yellow Buick the morning of the murders, and the testimony of a witness who saw her in the car shortly before and after the murders. The prosecutor deemed the inconsistency irrelevant. *Id.*, at 1571–1572.

After deliberating for four hours, the jury found Sampson Armstrong and the petitioner each guilty of two counts of first-degree murder[8] and one count of robbery.[9] The jury then heard evidence pertaining to the appropriate sentence for the two defendants, and recommended the death penalty for each defendant on each of the murder counts.[10]

---

[7] At the sentencing hearing, the prosecutor theorized that the petitioner was not the "trigger man," but the "person who set it all up." *Id.*, at 1679. The prosecutor admitted that he did not "know whether [the petitioner] set foot inside that house or not. But he drove them there. He set it up, planned it." *Id.*, at 1679–1680. In this Court as well, the State acknowledges that the petitioner "was apparently not the triggerman in the two murders involved in his *[sic]* case." Brief in Opposition 14.

[8] In Florida at the time of the Kersey murders, first-degree murder was defined in Fla. Stat. § 782.04(1)(a) (1973) as

"[t]he unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any . . . robbery . . . ."

In instructing the jury on first-degree murder, the judge read the above provision verbatim. Record 1605–1606. He also added that

"[t]he killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill." *Id.*, at 1606.

Distinguishing first- and second-degree felony murder, the judge stated:

"In order to sustain a conviction of first degree murder while engaging in the perpetration of or in the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery.

"In order to sustain a conviction of second degree murder while engaged in the perpetration of or the attempted perpetration of robbery, the evidence must establish beyond a reasonable doubt that the unlawful killing was committed in the perpetration of or in the attempted perpetration of robbery, and that the defendant actually, although not physically present at the time of the commission of the offense, did, nonetheless, procure, counsel, command or aid another to commit the crime." *Id.*, at 1609–1610.

[9] On the motion of the petitioner and the prosecution, Jeanette Armstrong's trial had been severed from the trial of her codefendants. *Id.*, at

In its sentencing findings,[11] the trial court found four statutory aggravating circumstances regarding the petitioner's involvement in the murder: (1) the petitioner previously had been convicted of a felony involving the use of violence (an armed robbery in 1957), Fla. Stat. § 921.141(5)(b) (1981); (2) the murders were committed during the course of a robbery, § 921.141(5)(d); (3) the murders were committed for pecuniary gain, § 921.141(5)(f); and (4) the murders were especially heinous, atrocious, or cruel because the Kerseys had been shot in a prone position in an effort to eliminate them as witnesses, § 921.141(5)(h). App. 30–31; 399 So. 2d 1362, 1371–1372 (Fla. 1981).[12]

50, 57. Jeanette Armstrong was tried first and convicted of two counts of second-degree murder and one count of robbery. The trial judge sentenced her to three consecutive life sentences. 399 So. 2d, at 1371.

[10] Under Florida law, the "court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment." Fla. Stat. § 921.141(1) (1981). The jury renders only an "advisory sentence" based on the mitigating and aggravating circumstances. § 921.141(2).

At the sentencing hearing, the petitioner presented no evidence, Record 1677, but his attorney argued that the death penalty was inappropriate because at most the evidence showed that the petitioner saw Thomas Kersey's money, suggested the robbery, and drove the Armstrongs to the Kersey house. *Id.*, at 1683–1684. He also argued that death was an excessive penalty because the gunfight was spontaneous, and beyond the petitioner's control. *Id.*, at 1684.

[11] Initially, the trial court failed to make written findings as required by Fla. Stat. § 921.141(3) (1981). On the first state appeal, the Florida Supreme Court remanded the case for such findings. See App. 29.

[12] Regarding the extent of the petitioner's involvement, the trial court reasoned that because two different guns had been used in the murders, and because Jeanette Armstrong had been seriously wounded by gunfire, the petitioner must have fired one of the guns. Moreover, since each of the Kerseys was injured by a bullet of each type, the petitioner must have shot each victim. *Id.*, at 31; 399 So. 2d, at 1372.

The trial court also found that "*none* of the statutory mitigating circumstances applied" to the petitioner. App. 32 (emphasis in original). Most notably, the court concluded that the evidence clearly showed that the petitioner was an accomplice to the capital felony and that his participation had not been "relatively minor," but had been major in that he "planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons." *Ibid.;* 399 So. 2d, at 1373. See Fla. Stat. § 921.141(6)(d) (1981).[13]

Considering these factors, the trial court concluded that the "aggravating circumstances of these capital felonies outweigh the mitigating circumstances," and imposed the death penalty for each count of murder. App. 32; 399 So. 2d, at 1373. The court sentenced the petitioner to life imprisonment for the robbery. App. 28.[14]

---

[13] The court also rejected the other statutory mitigating circumstances. In particular, the petitioner did not have a record free of criminal convictions, Fla. Stat. § 921.141(6)(a) (1981); there was no evidence that he had acted under the influence of extreme mental or emotional disturbance, § 921.141(6)(b); there was no evidence that the victims were participants in or consented to the crimes, § 921.141(6)(c); there was no evidence that he acted under extreme duress or under the substantial domination of another person, § 921.141(6)(e); there was no evidence that the petitioner was incapable of appreciating the criminality of his conduct or conforming his conduct to the requirements of law, § 921.141(6)(f); and because he was 42 years old at the time of the offense, his age was not a mitigating factor, § 921.141(6)(g). App. 32; 399 So. 2d, at 1372–1373.

[14] The trial court made nearly identical findings for Sampson Armstrong. In particular, it found that the murders were committed during the course of a robbery, that they were committed for pecuniary gain, and that they were especially heinous, atrocious, or cruel. See *Armstrong* v. *State*, 399 So. 2d 953, 960–961 (Fla. 1981). The trial court considered the only possible mitigating circumstance to be Armstrong's age (23), but did not actually find that fact to be mitigating. See *id.*, at 962 ("the factor of age was given no consideration"). Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial judge imposed the death penalty for each murder conviction, and imposed a life sentence for the robbery. *Id.*, at 955, 962.

On appeal, the Florida Supreme Court affirmed the petitioner's convictions and sentences.[15] In challenging his convictions for first-degree murder, the petitioner claimed that there was no evidence that he had committed premeditated murder, or that he had been present aiding and abetting the robbery when the Kerseys were shot. He argued that since the jury properly could have concluded only that he was in the car on the highway when the murders were committed, he could be found guilty at most of second-degree murder under the State's felony-murder rule.[16]

The court rejected this argument. Quoting from an earlier case, the Florida Supreme Court held:

> "'[A]n individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. . . . Moreover, the felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide. In Florida, as in the majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon. Only if the felon is an accessory before the fact and not personally present does liability attach under the second degree murder provision of the applicable statute in the instant case.'" 399 So. 2d, at 1369 (quoting *Adams* v. *State*, 341 So. 2d 765, 768–769 (Fla. 1976) (footnote omitted), cert. denied, 434 U. S. 878 (1977)).

---

[15] The Florida Supreme Court also affirmed the convictions and sentences of Sampson Armstrong. See *Armstrong* v. *State*, *supra*, at 960.

[16] Second-degree murder, based on felony murder, is defined in Fla. Stat. § 782.04(3) (1973):

"[W]hen committed in the perpetration of, or in the attempt to perpetrate, any . . . robbery, . . . except as provided in subsection (1), it shall be murder in the second degree . . . punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court."

Consequently, the critical issue regarding liability was whether the petitioner's conduct would make him a principal or merely an accessory before the fact to the underlying robbery. Under Florida law at the time of the murders, "if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder." 399 So. 2d, at 1370. Moreover,

> "'the presence of the aider and abetter need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission.'" *Ibid.* (quoting *Pope* v. *State*, 84 Fla. 428, 446, 94 So. 865, 871 (1922)).

The court noted that there "was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered." 399 So. 2d, at 1370.[17] Instead,

> "the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money." *Ibid.*

This evidence, the court concluded, was sufficient to find the petitioner to be a principal under state law, "constructively present aiding and abetting the commission of the crime of robbery," and thus guilty of first-degree murder. *Ibid.*

---

[17] The court also noted that Sampson Armstrong's admissions to J. B. Neal made no mention of the petitioner, and that the petitioner's admissions to Ida Jean Shaw indicated only "his complicity." 399 So. 2d, at 1370.

Turning to the trial court's written sentencing findings, the State Supreme Court rejected two of the four aggravating circumstances. First, the court held that two of the trial judge's findings—that the murders were committed both in the course of robbery and for pecuniary gain—referred to the same aspect of the petitioner's crime. Consequently, these facts supported only one aggravating circumstance. Second, citing *Armstrong* v. *State*, 399 So. 2d 953 (Fla. 1981), the court held that "[t]he recited circumstance, that the murders were especially heinous, atrocious, and cruel, cannot be approved." 399 So. 2d, at 1373.[18] The court affirmed the trial court's findings that none of the statutory mitigating circumstances applied. *Ibid.* Because one of those findings was that Enmund's participation in the capital felony was not minor, due to his role in planning the robbery, the State Supreme Court implicitly affirmed the finding that Enmund had planned the robbery.

Regarding the petitioner's claim that imposition of the death penalty, absent a showing that he intended to kill, would violate the Eighth Amendment's ban on cruel and unusual punishments, the court simply stated that the petitioner "offers us no binding legal authority that directly supports this proposition, and we therefore reject it." *Id.*, at 1371.

---

[18] In *Armstrong*, the Florida Supreme Court expressly had rejected the trial court's conclusion that the Kerseys were murdered in order to eliminate them as witnesses. "It simply cannot be said that there was proof that the robbers killed in order to assure that there would be no witnesses against them." 399 So. 2d, at 963. On the contrary, "[t]he only direct account of what transpired is from the testimony of J. B. Neal about Armstrong's statement to him. By that account, the shootings were indeed spontaneous and were precipitated by the armed resistance of Mrs. Kersey." *Ibid.* In reaching this conclusion, the State Supreme Court also rejected the trial court's conclusions derived from the pathologist's testimony. Rather than indicating that the victims were prone when shot, the pathologist's testimony "as to the direction of fire and the positions of the victims when shot [was] equivocal at best." *Ibid.*

II

Earl Enmund's claim in this Court is that the death sentence imposed by the Florida trial court, and affirmed by the Florida Supreme Court, is unconstitutionally disproportionate to the role he played in the robbery and murders of the Kerseys.[19] In particular, he contends that because he had no actual intent to kill the victims—in effect, because his behavior and intent were no more blameworthy than that of any robber—capital punishment is too extreme a penalty.[20]

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), a majority of this Court concluded that the death penalty does not invariably violate the Cruel and Unusual Punishments Clause of the Eighth Amendment.[21] See *id.*, at 187 (opinion of Stewart, POWELL, and STEVENS, JJ.) ("[W]hen a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes") (footnote omitted); *id.*, at 226 (opinion of WHITE, J.) (rejecting the argument that "the death penalty, however imposed and for whatever crime, is cruel and unusual punishment");

---

[19] In this Court, the petitioner neither challenges his convictions for robbery and felony murder nor argues that the State has overstepped constitutional bounds in defining murder to include felony murder. The petitioner's sole challenge is to the penalty imposed for the murders.

[20] Although the petitioner ostensibly relies on the fact that he was not the triggerman, the core of his argument is that the death penalty is disproportionate to his crime because he did not have the specific intent to kill the Kerseys. Pulling the trigger is only one factor, albeit a significant one, in determining intent. See Tr. of Oral Arg. 21–23 (counsel for petitioner asserting that so long as a defendant had the intent to kill, he need not actually have pulled the trigger in order to be subjected to capital punishment, and that even if he had pulled the trigger, he would not be subject to the death penalty absent a specific intent to kill).

[21] The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

id., at 227 (BLACKMUN, J., concurring in judgment). In no case since *Gregg* and its companion cases,[22] has this Court retreated from that position.[23] Recognizing the constitutionality of the death penalty, however, only marks the beginning of the inquiry, for Earl Enmund was not convicted of murder as it is ordinarily envisioned—a deliberate and premeditated, unlawful killing. Rather, through the doctrine of accessorial liability, the petitioner has been convicted of two murders that he did not specifically intend.[24] Thus, it is necessary to examine the concept of proportionality as enunciated in this Court's cases to determine whether the penalty imposed on Earl Enmund is unconstitutionally disproportionate to his crimes.

---

[22] See *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S. 325 (1976) (holding that Louisiana's mandatory death penalty statute violated the Eighth and Fourteenth Amendments); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (holding that the State's mandatory death penalty statute violated the Eighth and Fourteenth Amendments); *Jurek* v. *Texas*, 428 U. S. 262 (1976) (upholding the Texas death penalty statute); *Proffitt* v. *Florida*, 428 U. S. 242 (1976) (upholding Florida's death penalty statute).

[23] In only one case since *Gregg* has this Court upheld a challenged death sentence. See *Dobbert* v. *Florida*, 432 U. S. 282 (1977) (holding that changes in the death penalty statute between the time of the murder and the sentencing did not amount to an *ex post facto* violation). In five cases, the Court vacated the death sentence because the sentencer could not or did not consider all mitigating factors proffered by the defendant. See *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633 (1977) *(per curiam)*; *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion); *Bell* v. *Ohio*, 438 U. S. 637 (1978) (plurality opinion); *Green* v. *Georgia*, 442 U. S. 95 (1979) *(per curiam)*; *Eddings* v. *Oklahoma*, 454 U. S. 104 (1982) (adopting the reasoning of the *Lockett* plurality as the holding of the Court). In two cases, the Court reversed the judgments affirming the death sentences because the jury had been selected in violation of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). See *Adams* v. *Texas*, 448 U. S. 38 (1980); *Davis* v. *Georgia*, 429 U. S. 122 (1976) *(per curiam)*. In five other cases, the Court vacated death sentences for a variety of reasons unrelated to the proportionality of the punishment to the crime. See *Gardner* v. *Florida*, 430 U. S. 349 (1977) (plurality opinion) (due process violated when defendant had no chance to explain or deny information given to the sentencing judge); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) (plurality opinion) (reversing the death sentence because the aggravating circumstance relied upon by jury was not so tailored as to avoid arbitrary and capricious infliction of death penalty); *Beck* v. *Alabama*, 447 U. S. 625 (1980) (holding that death penalty may not be imposed where jury was precluded from considering lesser included noncapital offense, when evidence existed to support such a verdict); *Bullington* v. *Missouri*, 451 U. S. 430 (1981) (holding that Double Jeopardy Clause prevented imposition of death sentence upon retrial when jury had imposed life imprisonment at the first trial); *Estelle* v. *Smith*, 451 U. S. 454 (1981) (holding that admission of psychiatrist's testimony at the penalty phase of the capital trial violated the defendant's Fifth Amendment

A

The Eighth Amendment concept of proportionality was first fully expressed in *Weems* v. *United States*, 217 U. S. 349 (1910). In that case, defendant Weems was sentenced to 15 years at hard labor for falsifying a public document.

---

privilege against self-incrimination because he had not been told before his psychiatric examination that his statements could be used against him during the sentencing proceeding).

In *Coker* v. *Georgia*, 433 U. S. 584 (1977), the Court vacated a death sentence for a man who had been convicted of rape of an adult woman. Nevertheless, the Court made clear that the death penalty is not *per se* disproportionate to the crime of murder. See, *e. g.*, *id.*, at 591 (opinion of WHITE, J.) ("It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment; . . . neither is it always disproportionate to the crime for which it is imposed"); *id.*, at 604 (opinion of BURGER, C. J.) (accepting "that the Eighth Amendment's concept of disproportionality bars the death penalty for minor crimes," but rejecting the argument that death is a disproportionate punishment for rape, much less murder).

[24] Strictly speaking, this Court cannot state unequivocally whether the petitioner specifically intended either to kill the Kerseys or to have them killed because the trial court made no findings on these issues. The trial court, however, did make the finding, not rejected by the Florida Supreme Court, that the petitioner's participation was not minor, but "major" in that he "planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons." App. 32. Accordingly, I proceed on the assumption that the petitioner's only intent was to commit an armed robbery with his accomplices, the Armstrongs.

After remarking that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and after comparing Weems' punishment to the punishments for other crimes, the Court concluded that the sentence was cruel and unusual. *Id.*, at 381.

Not until two-thirds of a century later, in *Coker* v. *Georgia*, 433 U. S. 584 (1977), did the Court declare another punishment to be unconstitutionally disproportionate to the crime. Writing for himself and three other Members of the Court, JUSTICE WHITE concluded that death is a disproportionate penalty for the crime of raping an adult woman. *Id.*, at 597.[25] In reaching this conclusion, the plurality was careful to inform its judgment "by objective factors to the maximum possible extent [by giving attention] to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions." *Id.*, at 592. The plurality's resort to objective factors was no doubt an effort to derive "from the evolving standards of decency that mark the progress of a maturing society" the meaning of the requirement of proportionality contained within the Eighth Amendment. *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (opinion of Warren, C. J.).

The plurality noted that within the previous 50 years a majority of the States had never authorized death as a punishment for rape. More significantly to the plurality, only 3 of the 35 States that immediately reinstituted the death penalty following the Court's judgment in *Furman* v. *Georgia*, 408 U. S. 238 (1972) (invalidating nearly all state capital punishment statutes), defined rape as a capital offense.[26] The plurality also considered "the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." 433 U. S., at 596. See *Gregg* v. *Georgia,* 428 U. S., at 181 (opinion of Stewart, POWELL, and STEVENS, JJ.) ("The jury also is a significant and reliable objective index of contemporary values because it is so directly involved"). From the available data, the plurality concluded that in at least 90% of the rape convictions since 1973, juries in Georgia had declined to impose the death penalty. 433 U. S., at 597.

---

[25] JUSTICE POWELL concurred in the plurality's reasoning in concluding that "ordinarily" death was disproportionate for such a crime, but stopped short of a *per se* rule. 433 U. S., at 601. JUSTICE BRENNAN and JUSTICE MARSHALL concurred in the judgment, adhering to their previously announced views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *id.*, at 600–601.

Thus, the conclusion reached in *Coker* rested in part on the Court's observation that *both* legislatures *and* juries firmly rejected the penalty of death for the crime of rape. See *Woodson* v. *North Carolina,* 428 U. S. 280, 293 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) (concluding that the State's mandatory death penalty statute violates the Eighth Amendment because the "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—both point conclusively to the repudiation of automatic death sentences").

In addition to ascertaining "contemporary standards," the plurality opinion also considered qualitative factors bearing on the question whether the death penalty was disproportionate, for "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U. S., at 597. The plurality acknowledged that a rapist is almost as blameworthy as a murderer, describing the crime of rape as "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim." *Ibid.* Despite the enormity of the crime of rape, however, the Court concluded that the death penalty was "grossly out of proportion to the severity of the crime," *id.*, at 592, in part because the harm caused by a rape "does not compare with murder, which does involve the unjustified taking of human life." *Id.*, at 598.

---

[26] In fact, two of those States, Louisiana and North Carolina, did not define rape as a capital felony when they reenacted their death penalty statutes following their invalidation in *Woodson* v. *North Carolina,* 428 U. S. 280 (1976), and *Roberts* v. *Louisiana,* 428 U. S. 325 (1976). See 433 U. S., at 594. Consequently, at the time *Coker* was decided only Georgia authorized the death penalty for the rape of an adult woman.

Coker teaches, therefore, that proportionality—at least as regards capital punishment—not only requires an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness.[27] Moreover, because they turn on considerations unique to each defendant's case, these latter factors underlying the concept of proportionality are reflected in this Court's conclusion in *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978), that "individualized consideration [is] a constitutional requirement in imposing the death sentence" (opinion of BURGER, C. J.) (footnote omitted). See *id.*, at 613 (opinion of BLACKMUN, J.) ("the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide").

---

[27] The Court has conducted a less searching inquiry for punishments less than death. See *Rummel* v. *Estelle*, 445 U. S. 263 (1980) (upholding, against an Eighth Amendment challenge, a life sentence imposed under a state recidivist statute); *Hutto* v. *Davis*, 454 U. S. 370 (1981) *(per curiam)* (upholding, on the basis of *Rummel*, a 40-year sentence for two marihuana convictions). In *Rummel*, the Court expressly noted that, for purposes of Eighth Amendment analysis, those "decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality" of prison sentences. 445 U. S., at 272.

In sum, in considering the petitioner's challenge, the Court should decide not only whether the petitioner's sentence of death offends contemporary standards as reflected in the responses of legislatures and juries, but also whether it is disproportionate to the harm that the petitioner caused and to the petitioner's involvement in the crime, as well as whether the procedures under which the petitioner was sentenced satisfied the constitutional requirement of individualized consideration set forth in *Lockett*.

B

Following the analysis set forth in *Coker*, the petitioner examines the historical development of the felony-murder rule, as well as contemporary legislation and jury verdicts in capital cases, in an effort to show that imposition of the death penalty on him would violate the Eighth Amendment. This effort fails, however, for the available data do not show that society has rejected conclusively the death penalty for felony murderers.

As the petitioner acknowledges, the felony-murder doctrine, and its corresponding capital penalty, originated hundreds of years ago,[28] and was a fixture of English common law until 1957 when Parliament declared that an unintentional killing during a felony would be classified as manslaughter.[29] The common-law rule was transplanted to the American Colonies, and its use continued largely unabated into the 20th century, although legislative reforms often restricted capital felony murder to enumerated violent felonies.[30]

---

[28] According to one source, at early common law most felonies were capital crimes, but attempts were punished as misdemeanors and accidental killings were not punishable at all. The felony-murder rule was an effort to create felony liability for accidental killings caused during the course of an attempted felony. See ALI, Model Penal Code § 210.2, Comment, p. 31, n. 74 (Off. Draft and Revised Comments 1980).

[29] See English Homicide Act of 1957, 5 & 6 Eliz. 2, ch. 11. The English attitude toward capital punishment, as reflected in recent legislation, differs significantly from American attitudes as reflected in state legislation; in 1965, England abolished the death penalty for all murders. See Murder (Abolition of Death Penalty) Act of 1965, 8 Halsbury's Statutes of England 541 (3d ed. 1969).

The petitioner discounts the weight of this historical precedent by arguing that jurors and judges widely resisted the application of capital punishment by acquitting defendants in felony-murder cases or by convicting them of noncapital manslaughter.[31] The force of the petitioner's argument is speculative at best, however, for it is unclear what fraction of the jury nullification in this country resulted from dissatisfaction with the capital felony-murder rule. Much of it, surely, was a reaction to the mandatory death penalty, and the failure of the common law and early state statutes to classify murder by degree. In fact, it was in response to juror attitudes toward capital punishment that most jurisdictions by the early part of this century replaced their mandatory death penalty statutes with statutes allowing juries the discretion to decide whether to impose or to recommend the death penalty. See *Woodson* v. *North Carolina*, 428 U. S., at 291–292 (opinion of Stewart, POWELL, and STEVENS, JJ.).[32] Thus, it simply is not possible to conclude that historically this country conclusively has rejected capital punishment for homicides committed during the course of a felony.

---

[30] See Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 364–365 (1978); Alderstein, Felony-Murder in the New Criminal Codes, 4 Am. J. Crim. L. 249, 251–252 (1976).

[31] See, *e. g.*, Royal Commission on Capital Punishment 1949–1953, Report 31–33 (1953) (reporting that application of the felony-murder doctrine was limited to those cases in which the verdict could have been intentional murder); Law Revision Commission of the State of New York, 3d Annual Report 665, 668, and n. 444 (1937). It is significant that the New York Legislature rejected the Commission's recommendation of requiring some element of *mens rea*, and instead adopted a scheme giving jurors discretion to recommend life sentences. See 1937 N. Y. Laws, ch. 67.

[32] The extent of jury nullification and the nearly complete repudiation of mandatory death penalty laws led a plurality of this Court to conclude that the "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—both point conclusively to the repudiation of automatic death sentences." *Woodson* v. *North Carolina*, 428 U. S., at 293 (opinion

The petitioner and the Court turn to jury verdicts in an effort to show that, by present standards at least, capital punishment is grossly out of proportion to the crimes that the petitioner committed. Surveying all reported appellate court opinions since 1954 involving executions, the petitioner has found that of the 362 individuals executed for homicide, 339 personally committed the homicidal assault, and two others each had another person commit the homicide on his behalf. Only six persons executed were "non-triggermen."[33] A similar trend can be seen in the petitioner's survey of the current death row population.[34] Of the 739 prisoners for whom sufficient data are available, only 40 did not participate in the homicidal assault, and of those, only 3 (including the petitioner) were sentenced to death absent a finding that they had collaborated with the killer in a specific plan to kill. Brief for Petitioner 35–36. See also App. to Reply Brief for Petitioner (showing that of the 45 felony murderers currently on death row in Florida, 36 were found by the State Supreme Court or a trial court to have had the intent to kill; in 8 cases, the state courts made no finding, but the defendant was the triggerman; and in 1, the petitioner's case, the defendant was not the triggerman, and there was no finding of intent to kill).

Impressive as these statistics are at first glance, they cannot be accepted uncritically. So stated, the data do not reveal the number or fraction of homicides that were charged as felony murders, or the number or fraction of cases in which the State sought the death penalty for an accomplice guilty of

---

of Stewart, POWELL, and STEVENS, JJ.). These factors supported the Court's conclusion that North Carolina's mandatory death penalty law violated the Eighth Amendment.

[33] See App. D to Brief for Petitioner. Moreover, the last nontriggerman was executed in 1955. By contrast, 72 rapists were executed between 1955 and this Court's 1977 decision in *Coker*. Brief for Petitioner 34–35.

[34] See App. E to Brief for Petitioner; NAACP Legal Defense and Education Fund, Inc., Death Row U. S. A. (Oct. 20, 1981).

felony murder. Consequently, we cannot know the fraction of cases in which juries rejected the death penalty for accomplice felony murder. Moreover, as JUSTICE BLACKMUN pointed out in his concurring opinion in *Lockett* v. *Ohio*, 438 U. S., at 615, n. 2, many of these data classify defendants by whether they "personally committed a homicidal assault," and do not show the fraction of capital defendants who were shown to have an intent to kill. While the petitioner relies on the fact that he did not pull the trigger, his principal argument is, and must be, that death is an unconstitutional penalty absent an intent to kill, for otherwise defendants who hire others to kill would escape the death penalty. See n. 20, *supra*. Thus, the data he presents are not entirely relevant. Even accepting the petitioner's facts as meaningful, they may only reflect that sentencers are especially cautious in imposing the death penalty, and reserve that punishment for those defendants who are sufficiently involved in the homicide, whether or not there was specific intent to kill.

Finally, as the petitioner acknowledges, the jury verdict statistics cannot be viewed in isolation from state death penalty legislation. The petitioner and the Court therefore review recent legislation in order to support the conclusion that society has rejected capital felony murder. Of the 35 States that presently have a death penalty, however, fully 31 authorize a sentencer to impose a death sentence for a death that occurs during the course of a robbery.[35] The States are not uniform in delimiting the circumstances under which the death penalty may be imposed for felony murder, but each state statute can be classified as one of three types. The first category, containing 20 statutes, includes those States that permit imposition of the death penalty for felony murder even though the defendant did not commit the homicidal act, and even though he had no actual intent to kill.[36] Three addi-

---

[35] Only Missouri, New Hampshire, and Pennsylvania define felony murder as a crime distinct from capital murder. See Mo. Rev. Stat. §§ 565.001, 565.003, 565.008(2) (1978); N. H. Rev. Stat. Ann. §§ 630:1, 630:1–a(I)(b)(2), 630:1–a(III) (1974 and Supp. 1981); 18 Pa. Cons. Stat. §§ 2502(a), (b), (d), 1102(b) (1980). One exception to the New Hampshire scheme is § 630:1(I)(b), which includes in the definition of capital murder a death caused "knowingly" in the course of a kidnaping. A fourth State, Washington, permits imposition of the death penalty if premeditated murder is aggravated by, *inter alia*, commission during a felony. Wash. Rev. Code §§ 9A.32.030(1)(a), 10.95.020(9) (1981).

---

[36] See Ariz. Rev. Stat. Ann. §§ 13-1105(A)(2), (C) (Supp. 1981-1982); Cal. Penal Code Ann. §§ 189, 190 (West Supp. 1982); Colo. Rev. Stat. §§ 18-3-102(1)(b), 18-1-105(1)(a) (1978 and Supp. 1981); Conn. Gen. Stat. Ann. §§ 53a-54b, 53a-54c, 53a-35a(1) (West Supp. 1982); Fla. Stat. §§ 782.04(1)(a), 775.082(1) (1981); Ga. Code §§ 26-1101(b), (c) (1978); Idaho Code §§ 18-4003(d), 4004 (1979); Ind. Code §§ 35-42-1-1(2), 35-50-2-3(b) (Supp. 1981); Miss. Code Ann. §§ 97-3-19(2)(e), 97-3-21 (Supp. 1981); Mont. Code Ann. §§ 45-5-102(1)(b), (2) (1981); Neb. Rev. Stat. §§ 28-303(2), 28-105(1) (1979); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4)(a) (1981); N. M. Stat. Ann. §§ 30-2-1(A)(2), 31-18-14(A), 31-20A-5 (Supp. 1981); N. C. Gen. Stat. § 14-17 (1981); Okla. Stat., Tit. 21, §§ 701.7(B), 701.9(A) (1981); S. C. Code §§ 16-3-10, 16-3-20(C)(a)(1) (1976 and Supp. 1981); S. D. Codified Laws §§ 22-16-4, 22-16-12, 22-6-1(1), 22-3-3 (1979 and Supp. 1981); Tenn. Code Ann. §§ 39-2402(a), (b) (Supp. 1981); Vt. Stat. Ann., Tit. 13, §§ 2301, 2303(b), (c) (1974 and Supp. 1981); and Wyo. Stat. §§ 6-4-101(a), (b) (1977).

Two of these States, Colorado and Connecticut, provide that it is an affirmative defense to the capital crime if the accomplice did not "in any way solicit, request, command, importune, cause or aid the commission" of the homicidal act; was not armed with a deadly weapon and had no reason to believe that his cofelons were so armed; and did not engage or intend to engage, and had no reason to believe that his cofelons would engage, in conduct "likely to result in death or serious bodily injury." See Colo. Rev. Stat. § 18-3-102 (2) (1978); Conn. Gen. Stat. § 53a-54c (Supp. 1982). Colorado also prevents imposition of the death penalty if the defendant's role, though sufficient to establish guilt, was "relatively minor." Colo. Rev. Stat. § 16-11-103(5)(d) (1978). Even if they were available under the Florida statute, these provisions would have been of no help to the petitioner since the trial court found that there were no mitigating circumstances, in part because Enmund's role in the capital felony was not minor. See Fla. Stat. § 921.141(6)(d) (1981). The State Supreme Court expressly affirmed the trial court's finding of no mitigating circumstances, and therefore the finding that the petitioner's role was not minor. 399 So. 2d, at 1373.

Of course, not all of the statutes listed above are identical. Several of them provide that robbery murder is a capital felony, but require proof of tional States, while requiring some finding of intent, do not require the intent to kill that the petitioner believes is constitutionally mandated before the death sentence may be imposed.[37] The second category, containing seven statutes, includes those States that authorize the death penalty only if the defendant had the specific intent (or some rough equivalent) to kill the victim.[38] The third class of statutes, from

---

additional aggravating circumstances, *e. g.*, the defendant had been convicted previously of a violent felony, or the victim was a correctional officer, before the death penalty can be imposed. See, *e. g.*, Okla. Stat., Tit. 21, § 701.12 (1981); N. M. Stat. Ann. §§ 30-2-1(A)(2), 31-18-14(A), 31-20A-5 (Supp. 1981). Others, like the Florida statute, define robbery murder as a capital offense and use the robbery as an aggravating circumstance. The common thread in all of these statutes, however, is that the defendant need not have the intent to kill in order to be subject to the death penalty. The Court's additional subdivision of this group of statutes, see *ante*, at 791-793, and nn. 10-13, serves only to obscure the point that 20 States permit imposition of the death penalty even though the defendant did not actually kill, and had no intent to kill.

[37] See Ark. Stat. Ann. §§ 41-1501(1)(a), (2), (3) (1977) (a capital crime if death occurs during commission of the felony "under circumstances manifesting extreme indifference to the value of human life"); Del. Code Ann., Tit. 11, §§ 636(a)(6), 636(b), 4209(a) (1979) (a capital crime only if the death is caused "with criminal negligence"); Ky. Rev. Stat. § 507.020(1)(b), (2) (Supp. 1980) (defendant must "caus[e] the death of another person" under "circumstances manifesting extreme indifference to human life [and while] wantonly engag[ing] in conduct which creates a grave risk of death to another person"). It is an affirmative defense to capital felony murder in Arkansas if the "defendant did not commit the homicide act or in any way solicit, command, induce, procure, counsel, or aid its commission." Ark. Stat. Ann. § 41-1501(2) (1977).

At oral argument, counsel for petitioner stated that "the determining factor is the intent to take life, conscious purpose to take life." Tr. of Oral Arg. 18. Under the petitioner's proposed standard, these statutes would be unconstitutional.

[38] See Ala. Code §§ 13A-2-23, 13A-5-40(a)(2), (b), (c), (d), 13A-6-2(a)(1) (1977 and Supp. 1982) (the accomplice is not guilty of capital murder unless the killing is intentional, and the accomplice had "intent to promote or assist the commission" of the murder); Ill. Rev. Stat., ch. 38, ¶¶ 9-1(a)(3), 9-1(b)(6) (1979) (a capital crime only if the defendant killed intentionally or with knowledge that his actions "created a strong probability of death or

only three States, restricts application of the death penalty to those felony murderers who actually commit the homicide.[39]

The Court's curious method of counting the States that authorize imposition of the death penalty for felony murder cannot hide the fact that 23 States permit a sentencer to impose the death penalty even though the felony murderer has neither killed nor intended to kill his victim. While the Court acknowledges that eight state statutes follow the Florida death penalty scheme, see *ante*, at 789, n. 5, it also concedes that 15 other statutes permit imposition of the death penalty where the defendant neither intended to kill or actually killed the victims. See *ante*, at 790, n. 8 (Arkansas, Delaware, and Kentucky); *ante*, at 793–794, n. 15 (New Mexico); *ante*, at 791, n. 10 (Colorado); *ante*, at 791, n. 11 (Vermont); *ante*,

---

great bodily harm"); La. Rev. Stat. Ann. § 14.30(1) (West Supp. 1982) (defendant is guilty of capital murder only if he had "specific intent to kill or to inflict great bodily harm"); Ohio Rev. Code Ann. §§ 2903.01(B), (C), (D), 2929.02(A), 2929.04(A)(7) (1982) (accomplice is not guilty of the capital crime unless he "purposely cause[d]" the death and was "specifically found to have intended to cause the death of another"; if defendant is not the "principal offender," the death penalty is precluded unless he "committed the aggravated murder with prior calculation and design"); Tex. Penal Code Ann. §§ 12.31, 19.03(a)(2), 19.02(a)(1) (1974) (defendant is guilty of capital murder only if he "intentionally or knowingly" caused death during the course of the robbery); Utah Code Ann. §§ 76–5–202(1)(d), (2), 76–3–206(1) (1978) (defendant is guilty of capital murder only if he "intentionally or knowingly" caused the death during the course of the robbery); and Va. Code §§ 18.2–31(d), 18.2–10(a) (1982) (capital murder only if killing is "willful, deliberate and premeditated").

[39] See Ill. Rev. Stat., ch. 38, ¶¶ 9–1(a)(3), 9–1(b)(6) (1979) (a capital crime only if the defendant actually killed the victim and the defendant killed intentionally or with knowledge that his actions "created a strong probability of death or great bodily harm"); Md. Ann. Code, Art. 27, §§ 410, 412(b), 413(d)(10), (e)(1) (1982) (except in cases of murder for hire, only principal in the first degree subject to the death penalty); Va. Code §§ 18.2–31(d), 18.2–10(a), 18.2–18 (1982) (except in cases of murder for hire, only the immediate perpetrator of the homicide, and not accomplice before the fact or principal in the second degree, may be tried for capital murder). Note that Illinois and Virginia also require an intent to kill. See n. 38, *supra*.

at 792, n. 12 (Arizona, Connecticut, Indiana, Montana, Nebraska, and North Carolina); *ante*, at 792, n. 13 (Idaho, Oklahoma, and South Dakota). Not all of the statutes list the same aggravating circumstances. Nevertheless, the question before the Court is not whether a particular species of death penalty statute is unconstitutional, but whether a scheme that permits imposition of the death penalty, absent a finding that the defendant either killed or intended to kill the victims, is unconstitutional. In short, the Court's peculiar statutory analysis cannot withstand closer scrutiny.

Thus, in nearly half of the States, and in two-thirds of the States that permit the death penalty for murder, a defendant who neither killed the victim nor specifically intended that the victim die may be sentenced to death for his participation in the robbery-murder. Far from "weigh[ing] very heavily on the side of rejecting capital punishment as a suitable penalty for" felony murder, *Coker* v. *Georgia*, 443 U. S., at 596, these legislative judgments indicate that our "evolving standards of decency" still embrace capital punishment for this crime. For this reason, I conclude that the petitioner has failed to meet the standards in *Coker* and *Woodson* that the "two crucial indicators of evolving standards of decency . . . —jury determinations and legislative enactments—*both point conclusively* to the repudiation" of capital punishment for felony murder. 428 U. S., at 293 (emphasis added). In short, the death penalty for felony murder does not fall short of our national "standards of decency."

C

As I noted earlier, the Eighth Amendment concept of proportionality involves more than merely a measurement of contemporary standards of decency. It requires in addition that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness. Critical to the holding in *Coker*, for example, was that "in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which . . . involve[s] the unjustified taking of human life." 433 U. S., at 598.

Although the Court disingenuously seeks to characterize Enmund as only a "robber," *ante*, at 797, it cannot be disputed that he is responsible, along with Sampson and Jeanette Armstrong, for the murders of the Kerseys. There is no dispute that their lives were unjustifiably taken, and that the petitioner, as one who aided and abetted the armed robbery, is legally liable for their deaths.[40] Quite unlike the defendant in *Coker*, the petitioner cannot claim that the penalty imposed is "grossly out of proportion" to the harm for which he admittedly is at least partly responsible.

The Court's holding today is especially disturbing because it makes intent a matter of federal constitutional law, requiring this Court both to review highly subjective definitional problems customarily left to state criminal law and to develop an Eighth Amendment meaning of intent. As JUSTICE BLACKMUN pointed out in his concurring opinion in *Lockett*, the Court's holding substantially "interfere[s] with the States' individual statutory categories for assessing legal guilt." 438 U. S., at 616.[41] See also *id.*, at 635–636 (opinion of REHNQUIST, J.) (rejecting the idea that intent to kill must be proved before the State can impose the death penalty). Although the Court's opinion suggests that intent can be ascertained as if it were some historical fact, in fact it is a legal concept, not easily defined. Thus, while proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness, the Court fails to explain why the Eighth Amendment concept of proportionality requires rejection of standards of blameworthiness based on other levels of intent, such as, for example, the intent to commit an armed robbery coupled with the knowledge that armed robberies involve substantial risk of death or serious injury to other persons. Moreover, the intent-to-kill requirement is crudely crafted; it fails to take into account the complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, the defendant's contribution to the planning and success of the crime, and the defendant's actual participation during the commission of the crime. Under the circumstances, the determination of the degree of blameworthiness is best left to the sentencer, who can sift through the facts unique to each case. Consequently, while the type of *mens rea* of the defendant must be considered carefully in assessing the proper penalty, it is not so critical a factor in determining blameworthiness as to require a finding of intent to kill in order to impose the death penalty for felony murder.

---

[40] The Court's attempt to downplay the significance of Enmund's role in the murders, see *ante*, at 786–787, n. 2, does not square with the facts of this case. The trial court expressly found that because Enmund had planned the robbery, his role was not minor, and that therefore no statutory mitigating circumstances applied. The Florida Supreme Court affirmed the finding of no mitigating circumstances, thereby affirming the underlying factual predicate—Enmund had planned the armed robbery. Moreover, even Enmund's trial counsel conceded at the sentencing hearing that Enmund initiated the armed robbery and drove the getaway car. See n. 10, *supra*.

The Court misreads the opinion below in suggesting that the State Supreme Court deduced from the *sentencing hearing* that Enmund's only participation was as the getaway driver. In fact, the court made that statement with respect to the *guilt* phase of the trial. As I mentioned above, Enmund's counsel conceded at the sentencing hearing that Enmund had initiated the armed robbery.

In sum, the petitioner and the Court have failed to show that contemporary standards, as reflected in both jury determinations and legislative enactments, preclude imposition of the death penalty for accomplice felony murder. Moreover, examination of the qualitative factors underlying the concept of proportionality do not show that the death penalty is disproportionate as applied to Earl Enmund. In contrast to the crime in *Coker*, the petitioner's crime involves the very type of harm that this Court has held justifies the death penalty. Finally, because of the unique and complex mixture of facts involving a defendant's actions, knowledge, motives, and participation during the commission of a felony murder, I believe that the factfinder is best able to assess the defendant's blameworthiness. Accordingly, I conclude that the death penalty is not disproportionate to the crime of felony murder, even though the defendant did not actually kill or intend to kill his victims.[42]

---

[41] It is not true, as the petitioner suggests, that an intent-to-kill requirement would not interfere with the State's substantive categories of murder. Prohibiting the death penalty for accomplice felony murder would create a category of murder between capital murder, for which the death penalty is permitted, and the next statutory degree, for which some term of years (typically less than life imprisonment) is imposed.

---

[42] The petitioner and the Court also contend that capital punishment for felony murder violates the Eighth Amendment because it "makes no measurable contribution to acceptable goals of punishment." *Coker* v. *Georgia*, 433 U. S., at 592. In brief, the petitioner and the Court reason that since he did not specifically intend to kill the Kerseys, since the probability of death during an armed robbery is so low, see ALI, Model Penal Code, *supra* n. 28, § 210.2, Comment, p. 38, n. 96 (concluding from several studies that a homicide occurs in about one-half of one percent of all robberies), and since the death penalty is so rarely imposed on nontriggermen, capital punishment could not have deterred him or anyone else from participating in the armed robbery. The petitioner and the Court also reject the notion that the goal of retribution might be served because his "moral guilt" is too insignificant.

At their core, these conclusions are legislative judgments regarding the efficacy of capital punishment as a tool in achieving retributive justice and deterring violent crime. Surely, neither the petitioner nor the Court has shown that capital punishment is ineffective as a deterrent for his crime; the most the Court can do is speculate as to its effect on other felony murderers and rely on "competent observers" rather than legislative judgments. See *ante*, at 799–800. Moreover, the decision of whether or not a particular punishment serves the admittedly legitimate goal of retribution seems uniquely suited to legislative resolution. Because an armed robber takes a serious risk that someone will die during the course of his crime, and because of the obviousness of that risk, we cannot conclude that the death penalty "makes no measurable contribution to acceptable goals of punishment."

III

Although I conclude that the death penalty is not disproportionate to the crime of felony murder, I believe that, in light of the State Supreme Court's rejection of critical factual findings, our previous opinions require a remand for a new sentencing hearing.[43] Repeatedly, this Court has emphasized that capital sentencing decisions must focus "on the circumstances of each individual homicide and individual defendant." *Proffitt* v. *Florida*, 428 U. S. 242, 258 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). In striking down the mandatory capital punishment statute in *Woodson* v. *North Carolina*, 428 U. S., at 304, a plurality of the Court wrote:

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> ". . . [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

In *Lockett* v. *Ohio*, 438 U. S., at 605, a plurality of this Court concluded:

> "Given that the imposition of death by public authority is so profoundly different from all other penalties, we can-

---

[43] Apparently, the Court also intends that the case be remanded for a new death sentence hearing, consistent, of course, with its holding today.

> not avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence" (footnote omitted).

Accordingly, "the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (footnotes omitted). *Id.*, at 604. See *id.*, at 613 (opinion of BLACKMUN, J.) (concluding that the Ohio capital sentencing statute is unconstitutional because it "provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide"); *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) *(per curiam)* (holding that the exclusion of evidence, from the capital sentencing proceeding, that the petitioner was not present when the victim was killed violated due process because "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial"); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) (adopting the plurality's rule in *Lockett*). Thus, in deciding whether or not to impose capital punishment on a felony murderer, a sentencer must consider any relevant evidence or arguments that the death penalty is inappropriate for a particular defendant because of his relative lack of *mens rea* and his peripheral participation in the murder. Because of the peculiar circumstances of this case, I conclude that the trial court did not give sufficient consideration to the petitioner's role in the crimes, and thus did not consider the mitigating circumstances proffered by the defendant at his sentencing hearing.[44]

In sentencing the petitioner, the trial court found four statutory aggravating circumstances: the petitioner had been convicted previously of a violent felony; the murders had been committed during the course of a robbery; the murders had been committed for pecuniary gain; and the murders were especially heinous, atrocious, or cruel. In its factual findings, the trial court stated that the "armed robbery . . . was planned ahead of time by the defendant Enmund," App. 30, and that he had shot each of the victims while they lay prone in order to eliminate them as witnesses. *Id.*, at 30–31. The court expressly found that "*none* of the statutory mitigating circumstances applied" to the petitioner. *Id.*, at 32 (emphasis in original). Among other findings, the court rejected Enmund's claim that his participation in the murders had been "relatively minor," and found instead that "his participation in the capital felony was major. The defendant Enmund planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons." *Ibid.*

The Florida Supreme Court rejected these findings in part. The court noted that there "was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered." 399 So. 2d, at 1370. Rather,

> "the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money." *Ibid.*

---

[44] Although the petitioner challenges the constitutionality of his sentencing hearing, he does not challenge the constitutionality of the statutory capital sentencing procedures. See *Proffitt* v. *Florida*, 428 U. S. 242 (1976) (upholding the Florida scheme).

Consequently, the court expressly rejected the trial court's finding that Enmund personally had committed the homicides. Reviewing the aggravating circumstances, the Supreme Court consolidated two of them, and rejected the trial court's conclusion that the murders had been "heinous, atrocious, or cruel," since the evidence showed that the Armstrongs had killed the Kerseys in a gun battle arising from Mrs. Kersey's armed resistance, and not that the petitioner had killed them in an effort to eliminate them as witnesses. See *Armstrong* v. *State*, 399 So. 2d, at 963.

Although the state statutory procedures did not prevent the trial judge from considering any mitigating circumstances,[45] the trial judge's view of the facts, in part rejected by the State Supreme Court, effectively prevented such consideration. In his erroneous belief that the petitioner had shot both of the victims while they lay in a prone position in order to eliminate them as witnesses, the trial judge necessarily rejected the only argument offered in mitigation—that the petitioner's role in the capital felonies was minor, undeserving of the death penalty, because the petitioner was in the car when the fatal shots were fired. This fundamental misunderstanding of the petitioner's role in the crimes prevented the trial court from considering the "circumstances of the particular offense" in imposing sentence. *Woodson* v. *North Carolina*, 428 U. S., at 304. Moreover, this error was not so insignificant that we can be sure its effect on the sentencing judge's decision was negligible.[46] Accordingly, I would vacate the decision below insofar as it affirms the death sentence, and remand the case for a new sentencing hearing.

---

[45] See *Songer* v. *State*, 365 So. 2d 696, 700 (Fla. 1978) (holding that Fla. Stat. § 921.141(6) (1981), which lists mitigating circumstances, does not restrict the sentencer's consideration of mitigating circumstances to those expressly listed in the statute); *Shriner* v. *State*, 386 So. 2d 525, 533 (Fla. 1980), cert. denied, 449 U. S. 1103 (1981); 399 So. 2d, at 1371. As noted above, the petitioner offered no additional evidence at the sentencing hearing in mitigation of his crime. See Record 1677. His counsel argued, however, that the petitioner did not deserve the death penalty because his role in the crime was relatively minor. *Id.*, at 1683–1685.

---

[46] The Florida Supreme Court's opinion fails to correct this error either by remanding for new sentencing or by evaluating the impact of the trial court's fundamental misperception of the petitioner's role in the killings. Rather, the court simply repeats three times, without any discussion of the evidence, that there are "no mitigating circumstances." 399 So. 2d, at 1373. In light of the court's dramatically different factual findings, this review is inadequate to satisfy the *Lockett* principle.

RAMAH NAVAJO SCHOOL BOARD, INC., ET AL. *v.* BUREAU OF REVENUE OF NEW MEXICO

APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

No. 80-2162. Argued April 28, 1982—Decided July 2, 1982

Held: Federal law pre-empts New Mexico's tax imposed on the gross receipts that appellant non-Indian construction company received from appellant tribal school board for the construction of a school for Indian children on the reservation. *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, controlling. Pp. 836-847.

(a) In view of the federal and tribal interests arising from Congress' broad power to regulate tribal affairs under the Indian Commerce Clause, Art. I, § 8, cl. 3, and from the semi-autonomous status of Indian tribes, the exercise of state authority over commercial activity on an Indian reservation may be pre-empted by federal law, or it may interfere with the tribe's ability to exercise its sovereign functions. Traditional notions of tribal sovereignty, and the recognition and encouragement of such sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis. Ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity. Pp. 837-839.

(b) Federal statutes (particularly the Indian Self-Determination and Education Assistance Act) reflect the federal policy of encouraging the development of Indian-controlled institutions on the reservation, and under detailed regulations governing school construction the Bureau of Indian Affairs has wide-ranging authority to monitor and review subcontracting agreements between the Indian organization, which is viewed as the general contractor, and the non-Indian firm that actually constructs the facilities. The direction and supervision provided by the comprehensive federal regulatory scheme for the construction of Indian schools leave no room for the additional burden sought to be imposed by New Mexico. There is no merit to the contention that the state tax is not pre-empted merely because the federal statutes and regulations do not specifically express the intention to pre-empt this exercise of state authority. The interest asserted by the State relating to its providing services to the non-Indian contractor for its activities off the reservation is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization. Nor is the State's purpose in imposing the tax pursuant to a general desire to increase revenues sufficient to justify the additional burdens thereby imposed on the comprehensive federal scheme regulating the creation and maintenance of educational opportunities for Indian children and on the express federal policy of encouraging Indian self-sufficiency in the area of education. Pp. 839–845.

(c) Pre-emption analysis in this area need not be modified by applying a new approach relying on the Indian Commerce Clause. Existing preemption analysis governing this type of case provides sufficient guidance to state courts and also allows for more flexible consideration of the federal, state, and tribal interests at issue. Pp. 845–846.

95 N. M. 708, 625 P. 2d 1225, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which WHITE and STEVENS, JJ., joined, *post*, p. 847.

Michael P. Gross argued the cause for appellants. With him on the briefs were *Carl Bryant Rogers* and *Neal A. Jackson.*

Deputy Solicitor General Claiborne argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Dinkins, Elinor Hadley Stillman, Edward J. Shawaker,* and *Maria A. Iizuka.*

Jan Unna, Special Assistant Attorney General of New Mexico, argued the cause for appellee. With him on the brief were *Jeff Bingaman,* Attorney General, and *Gerald B. Richardson,* Assistant Attorney General.*

---

*Briefs of *amici curiae* urging reversal were filed by *George P. Vlassis* and *Katherine Ott* for the Navajo Tribe of Indians; and by *Richard W. Hughes* for the Pueblo of Santa Ana.

Helena S. Maclay and *Deirdre Boggs,* Special Assistant Attorneys General of Montana, *Leland T. Johnson,* Assistant Attorney General of Washington, *Warren Spannaus,* Attorney General of Minnesota, *Mark V. Meierhenry,* Attorney General of South Dakota, and *Richard H. Bryan,* Attorney General of Nevada, filed a brief for the State of Montana et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *George Deukmejian,* Attorney General, and *Neal J. Gobar,* Deputy Attorney General, for the State of California; and by *Arthur Lazarus, Jr.,* for the Association of American Indian Affairs, Inc.

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we address the question whether federal law pre-empts a state tax imposed on the gross receipts that a non-Indian construction company receives from a tribal school board for the construction of a school for Indian children on the reservation. The New Mexico Court of Appeals held that the gross receipts tax imposed by the State of New Mexico was permissible. Because the decision below is inconsistent with *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980) *(White Mountain)*, we reverse.

I

Approximately 2,000 members of the Ramah Navajo Chapter of the Navajo Indian Tribe live on tribal trust and allotment lands located in west central New Mexico. Ramah Navajo children attended a small public high school near the reservation until the State closed this facility in 1968. Because there were no other public high schools reasonably close to the reservation, the Ramah Navajo children were forced either to abandon their high school education or to attend federal Indian boarding schools far from the reservation. In 1970, the Ramah Navajo Chapter exercised its authority under Navajo Tribal Code, Title 10, § 51 (1969), and established its own school board in order to remedy this situation. Appellant Ramah Navajo School Board, Inc. (the Board), was organized as a nonprofit corporation to be operated exclusively by members of the Ramah Navajo Chapter. The Board is a Navajo "tribal organization" within the meaning of 25 U. S. C. § 450b(c), 88 Stat. 2204. With funds provided by the federal Bureau of Indian Affairs (BIA) and the Navajo Indian Tribe, the Board operated a school in the abandoned public school facility, thus creating the first independent Indian school in modern times.[1]

---

[1] On July 8, 1970, in his Message to the Congress on Indian Affairs, President Nixon referred specifically to these efforts of the Board to assume responsibility for the education of tribal children abandoned by the

In 1972, the Board successfully solicited from Congress funds for the design of new school facilities. Pub. L. 92–369, 86 Stat. 510. The Board then contracted with the BIA for the design of the new school and hired an architect. In 1974, the Board contracted with the BIA for the actual construction of the new school to be built on reservation land. Funding for the construction of this facility was provided by a series of congressional appropriations specifically earmarked for this purpose.[2] The contract specified that the Board was the design and building contractor for the project, but that the Board could subcontract the actual construction work to third parties. The contract further provided that any subcontracting agreement would have to include certain clauses governing pricing, wages, bonding, and the like, and that it must be approved by the BIA.

The Board then solicited bids from area building contractors for the construction of the school, and received bids from two non-Indian firms. Each firm included the state gross receipts tax as a cost of construction in their bids, although the tax was not itemized separately. Appellant Lembke Construction Co. (Lembke) was the low bidder and was awarded the contract. The contract between the Board and Lembke provides that Lembke is to pay all "taxes required by law." Lembke began construction of the school facilities in 1974 and continued this work for over five years. During that time, Lembke paid the gross receipts tax and, pursuant to standard industry practice, was reimbursed by the Board for the full amount paid. Before the second contract between Lembke and the Board was executed in 1977, a clause was inserted into the contract recognizing that the Board could

---

State as a "notable exampl[e]" of Indian self-determination. 6 Weekly Comp. of Pres. Doc. 894, 899 (1970).

[2] See Pub. L. 93–245, 87 Stat. 1073 (1973) (amending Pub. L. 93–120, 87 Stat. 431 (1973) to specifically earmark funds appropriated there for the construction of the Ramah school facility); Pub. L. 93–404, 88 Stat. 810 (1974); Pub. L. 94–165, 89 Stat. 985 (1975); Pub. L. 95–74, 91 Stat. 293 (1977).

litigate the validity of this tax and was entitled to any refund.

Both Lembke and the Board protested the imposition of the gross receipts tax. In 1978, after exhausting administrative remedies, they filed this refund action against appellee New Mexico Bureau of Revenue in the New Mexico District Court. At the time of trial, the parties stipulated that the Board had reimbursed Lembke for tax payments of $232,264.38 and that the Board would receive any refund that might be awarded.

The trial court entered judgment for the State Bureau of Revenue. After noting that the "legal incidence" of the tax fell on the non-Indian construction firm, the court rejected appellants' arguments that the tax was pre-empted by comprehensive federal regulation and that it imposed an impermissible burden on tribal sovereignty. The Court of Appeals for the State of New Mexico affirmed. 95 N. M. 708, 625 P. 2d 1225 (1980). Although acknowledging that the economic burden of the tax fell on the Board, the Court of Appeals concluded that the tax was not preempted by federal law and that it did not unlawfully burden tribal sovereignty. The Board filed a petition for rehearing in light of this Court's intervening decisions in *White Mountain*, *supra*, and *Central Machinery Co.* v. *Arizona State Tax Comm'n*, 448 U. S. 160 (1980). The Court of Appeals denied the petition, stating only that this case did not involve either "a comprehensive or pervasive scheme of federal regulation" or "federal regulation similar to the Indian trader statutes." App. to Juris. Statement 36. After initially granting discretionary review, the New Mexico Supreme Court quashed the writ as improvidently granted. 96 N. M. 17, 627 P. 2d 412 (1981). We noted probable jurisdiction. 454 U. S. 1079 (1981).

II

In recent years, this Court has often confronted the difficult problem of reconciling "the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 165 (1973). Although there is no definitive formula for resolving the question whether a State may exercise its authority over tribal members or reservation activities, we have recently identified the relevant federal, tribal, and state interests to be considered in determining whether a particular exercise of state authority violates federal law. See *White Mountain*, 448 U. S., at 141–145.

A

In *White Mountain*, we recognized that the federal and tribal interests arise from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause, Art. I, § 8, cl. 3, and from the semi-autonomous status of Indian tribes. 448 U. S., at 142. These interests tend to erect two "independent but related" barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be pre-empted by federal law, or it may interfere with the tribe's ability to exercise its sovereign functions. *Ibid.* (citing, *inter alia, Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *McClanahan* v. *Arizona State Tax Comm'n, supra;* and *Williams* v. *Lee*, 358 U. S. 217 (1959)). As we explained in *White Mountain:*

> "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' . . . against which vague or ambiguous federal enactments must always be measured." 448 U. S., at

143 (quoting *McClanahan* v. *Arizona State Tax Comm'n, supra*, at 172).

The State's interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight. Pre-emption analysis in this area is not controlled by "mechanical or absolute conceptions of state or tribal sovereignty"; it requires a particularized examination of the relevant state, federal, and tribal interests. 448 U. S., at 145. The question whether federal law, which reflects the related federal and tribal interests, pre-empts the State's exercise of its regulatory authority is not controlled by standards of pre-emption developed in other areas. *Id.*, at 143–144. Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry. See *id.*, at 143, and n. 10. Relevant federal statutes and treaties must be examined in light of "the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id.*, at 144–145. As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity. *Id.*, at 143–144, 150–151.

In *White Mountain*, we applied these principles and held that federal law pre-empted application of the state motor carrier license and use fuel taxes to a non-Indian logging company's activity on tribal land. We found the federal regulatory scheme for harvesting Indian timber to be so pervasive that it precluded the imposition of additional burdens by the relevant state taxes. *Id.*, at 148. The Secretary of the Interior (Secretary) had promulgated detailed regulations for developing "'Indian forests by the Indian people for the purpose of promoting self-sustaining communities.'" *Id.*, at 147 (quoting 25 CFR § 141.3(a)(3) (1979)).

Under these regulations, the BIA was involved in virtually every aspect of the production and marketing of Indian timber. 448 U. S., at 145–148. In particular, the Secretary and the BIA extensively regulated the contractual relationship between the Indians and the non-Indians working on the reservation: they established the bidding procedure, set mandatory terms to be included in every contract, and required that all contracts be approved by the Secretary. *Id.*, at 147.

We found that the state taxes in question would "threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . .'" *Id.*, at 149 (quoting 25 CFR § 141.3(a)(3) (1979)). We concluded that the imposition of state taxes would also undermine the Secretary's ability to carry out his obligations to set fees and rates for the harvesting and sale of the timber, and it would impede the "Tribe's ability to comply with the sustained-yield management policies imposed by federal law." 448 U. S., at 149–150. Balanced against this intrusion into the federal scheme, the State asserted only "a general desire to raise revenue" as its justification for imposing the taxes. *Id.*, at 150. In this context, this interest is insufficient to justify the State's intrusion into a sphere so heavily regulated by the Federal Government. *Ibid.*

B

This case is indistinguishable in all relevant respects from *White Mountain*. Federal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive. The Federal Government's concern with the education of Indian children can be traced back to the first treaties between the United States and the Navajo Tribe.[3] Since that time, Congress has enacted numerous statutes empowering the BIA to provide for Indian education both on and off the reservation. See, *e. g.*, Snyder Act, 42 Stat. 208 (1921), 25 U. S. C. § 13; Johnson-O'Malley Act, 48 Stat. 596 (1934), 25 U. S. C. § 452 *et seq.;* Navajo-Hopi Rehabilitation Act, 64 Stat. 44 (1950), 25 U. S. C. § 631 *et seq.;* Indian Self-Determination and Education Assistance Act, 88 Stat. 2203 (1975), 25 U. S. C. § 450 *et seq.* (Self-Determination Act). Although the early focus of the federal efforts in this area concentrated on providing federal or state educational facilities for Indian children, in the early 1970's the federal policy shifted toward encouraging the development of Indian-controlled institutions on the reservation. See 6 Weekly Comp. of Pres. Doc. 894, 899–900 (1970) (Message of President Nixon).

---

[3] Article VI of the 1868 Treaty between the United States and the Navajo Tribe, 15 Stat. 669, provides that "[i]n order to insure the civiliza-

This federal policy has been codified in the Indian Financing Act of 1974, 88 Stat. 77, 25 U. S. C. § 1451 *et seq.*, and most notably in the Self-Determination Act. The Self-Determination Act declares that a "major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." 88 Stat. 2203, as set forth in 25 U. S. C. § 450a(c). In achieving this goal, Congress expressly recognized that "parental and community control of the educational process is of crucial importance to the Indian people." 88 Stat. 2203, as set forth in 25 U. S. C. § 450(b)(3).

Section 450k empowers the Secretary to promulgate regulations to accomplish the purposes of the Act. 88 Stat. 2212, 25 U. S. C. § 450k. Pursuant to this authority, the Secretary has promulgated detailed and comprehensive regulations respecting "school construction for previously private

---

tion of the Indians entering into this treaty, the necessity of education is admitted."

schools now controlled and operated by tribes or tribally approved Indian organizations." 25 CFR § 274.1 (1981). Under these regulations, the BIA has wide-ranging authority to monitor and review the subcontracting agreements between the Indian organization, which is viewed as the general contractor, and the non-Indian firm that actually constructs the facilities. See 25 CFR § 274.2 (1981).[4] Specifically, the BIA must conduct preliminary on-site inspections, and prepare cost estimates for the project in cooperation with the tribal organization. 25 CFR § 274.22 (1981). The Board must approve any architectural or engineering agreements executed in connection with the project. 25 CFR § 274.32(c) (1981). In addition, the regulations empower the BIA to require that all subcontracting agreements contain certain terms, ranging from clauses relating to bonding and pay scales, 41 CFR § 14H–70.632 (1981), to preferential treatment for Indian workers. 25 CFR § 274.38 (1981). Finally, to ensure that the Tribe is fulfilling its statutory obligations, the regulations require the tribal organization to maintain records for the Secretary's inspection. 25 CFR § 274.41 (1981).

This detailed regulatory scheme governing the construction of autonomous Indian educational facilities is at least as comprehensive as the federal scheme found to be pre-emptive in *White Mountain.*[5] The direction and supervision provided by the Federal Government for the construction of Indian schools leave no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts paid to Lembke by the Board. This burden, although nominally falling on the non-Indian contractor, necessarily impedes the clearly expressed federal interest in promoting the "quality and quantity" of educational opportunities for Indians by depleting the funds available for the construction of Indian schools.[6]

---

[4] Although these regulations did not become effective until several months after the BIA and the Board had executed the initial contracts, the Secretary and the BIA had applied similar requirements under the authority of the Johnson-O'Malley Act, 48 Stat. 596, 25 U. S. C. § 452 *et seq.* In any event, the two subsequent agreements between the BIA, the Board and Lembke, accounting for two-thirds of the total construction, were signed after the effective date of these regulations, which clearly authorize the BIA to monitor these construction agreements.

[5] JUSTICE REHNQUIST asserts that the comprehensive federal regulatory scheme outlined above "do[es] not regulate school construction, which is the activity taxed." *Post*, at 851. The dissent fails to explain, however, how this fact distinguishes this case from *White Mountain.* In that

---

case, we struck down Arizona's use fuel tax and motor carrier license tax, not because of any federal interest in gasoline, licenses, or highways, but because the imposition of these state taxes on a non-Indian contractor doing work on the reservation was pre-empted by the "comprehensive regulation of the harvesting and sale of tribal timber." 448 U. S., at 151. We find that New Mexico is similarly precluded from impeding the federal interest in the construction of autonomous Indian educational institutions by imposing its gross receipts tax on Lembke. JUSTICE REHNQUIST's contention that the New Mexico tax is somehow compatible with this federal interest because such taxes "are as much a normal cost of school construction as the cost of cement and labor," *post*, at 855, is also foreclosed by *White Mountain*. Surely, state use fuel and motor carrier license taxes are considered part of the cost of harvesting and marketing timber. Yet in *White Mountain*, we concluded that these taxes impeded the federal interest in "guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding,'" 448 U. S., at 149, despite the dissent's argument that the taxes amounted to less than 1% of the annual profits produced by the logging operation. Here, as in *White Mountain*, JUSTICE REHNQUIST continues to press this argument.

[6] Appellee would have us impute congressional awareness and approval of the state gross receipts tax from appropriations bills which earmarked funds for the construction of these facilities, see n. 2, *supra*. Brief for Appellee 21–22. Appellee strains to find this awareness and approval by arguing that the same architects who prepared the cost estimates and requests that the Board submitted to Congress also prepared the bid specifications pursuant to which Lembke submitted its bid. However, as we have indicated, the bid specifications only required prospective bidders to include "all taxes required by law," and the submitted bids did not specify the gross receipts tax as a separate line item. *Supra*, at 835. Therefore, it is by no means clear, and the Board disputes the contention, that the Board ever intended to have these state taxes included in the construction costs of its school facilities. Furthermore, there is absolutely no

The Bureau of Revenue argues that imposition of the state tax is not pre-empted because the federal statutes and regulations do not specifically express the intention to pre-empt this exercise of state authority. This argument is clearly foreclosed by our precedents. In *White Mountain* we flatly rejected a similar argument. 448 U. S., at 150–151 (citing *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685 (1965); *Williams* v. *Lee*, 358 U. S. 217 (1959); and *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971)). There is nothing unique in the nature of a gross receipts tax or in the federal laws governing the development of tribal self-sufficiency in the area of education that requires a different analysis.

In this case, the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of paying this tax. Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has "left the State with no duties or responsibilities." *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, *supra*, at 691.[7] Nor has the State asserted any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax. The only arguably

---

indication that Congress was even made aware of the existence of these taxes when it appropriated funds for the construction of the Ramah Navajo school. In any event, as we have noted in a related context, courts should be wary of inferring congressional intent to alter the force of existing law from an appropriations Act. Cf. *TVA* v. *Hill*, 437 U. S. 153, 189–191 (1978).

[7] Of course, these statutes and regulations do not prevent the States from providing for the education of Indian children within their boundaries. Indeed, the Self-Determination Act specifically authorizes the Secretary to enter into contracts with any State willing to construct educational institutions for Indian children on or near the reservation. 88 Stat. 2214, 25 U. S. C. § 458. This case would be different if the State were actively seeking tax revenues for the purpose of constructing, or assisting in the effort to provide, adequate educational facilities for Ramah Navajo children.

specific interest advanced by the State is that it provides services to *Lembke* for its activities *off the reservation.* This interest, however, is not a legitimate justification for a tax whose ultimate burden falls on the tribal organization.[8] Furthermore, although the State may confer substantial benefits on Lembke as a state contractor, we fail to see how these benefits can justify a tax imposed on the construction of school facilities *on tribal lands* pursuant to a contract between the tribal organization and the non-Indian contracting firm.[9] The New Mexico gross receipts tax is intended to compensate the State for granting "the privilege of engaging in business." N. M. Stat. Ann. §§ 7-9-3(F) and 7-9-4(A) (1980). New Mexico has not explained the source of its power to levy such a tax in this case where the "privilege of doing business" on an Indian reservation is exclusively bestowed by the Federal Government.

---

[8] The Bureau of Revenue invites us to adopt the "legal incidence" test, under which the legal incidence and not the actual burden of the tax would control the pre-emption inquiry. Of course, in some contexts, the fact that the legal incidence of the tax falls on a non-Indian is significant. See *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 150-151 (1980); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976). However, in *White Mountain*, 448 U. S., at 151, we found it significant that the economic burden of the asserted taxes would ultimately fall on the Tribe, even though the legal incidence of the tax was on the non-Indian logging company. Given the comprehensive federal regulatory scheme at issue here, we decline to allow the State to impose additional burdens on the significant federal interest in fostering Indian-run educational institutions, even if those burdens are imposed indirectly through a tax on a non-Indian contractor for work done on the reservation.

[9] In *Central Machinery Co.* v. *Arizona State Tax Comm'n*, 448 U. S. 160 (1980), we held that the Indian trader statutes, 19 Stat. 200, 25 U. S. C. § 261 *et seq.*, pre-empted the State's jurisdiction to tax the sale of farm machinery to the Indian Tribe, notwithstanding the substantial services that the State undoubtedly provided to the off-reservation activities of the non-Indian seller. Presumably, the state tax revenues derived from Lembke's off-reservation business activities are adequate to reimburse the State for the services it provides to Lembke.

The State's ultimate justification for imposing this tax amounts to nothing more than a general desire to increase revenues. This purpose, as we held in *White Mountain*, 448 U. S., at 150, is insufficient to justify the additional burdens imposed by the tax on the comprehensive federal scheme regulating the creation and maintenance of educational opportunities for Indian children and on the express federal policy of encouraging Indian self-sufficiency in the area of education.[10] This regulatory scheme precludes any state tax that "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

C

The Solicitor General, in an *amicus* brief filed on behalf of the United States, suggests that we modify our pre-emption analysis and rely on the dormant Indian Commerce Clause, Art. I, §8, cl. 3, to hold that on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation, thus placing the burden on the State to demonstrate that its intrusion is either condoned by Congress or justified by a compelling need to protect legitimate, specified state interests other than the generalized desire to collect revenue. He argues that adopting this approach is preferable for several reasons: it would provide guidance to the state courts addressing these issues, thus reducing the need for our case-by-case review of these decisions; it would avoid the tension created by focusing on the pervasiveness of federal regulation as a principal barrier to state assertions of authority when the primary federal goal is to encourage tribal self-determination and self-government; and it would place a higher burden on the State to articulate clearly its particularized interests in taxing the transaction and to demonstrate the services it provides in assisting the taxed transaction.

---

[10] We are similarly unpersuaded by the State's argument that the significant services it provides to the Ramah Navajo Indians justify the imposition of this tax. The State does not suggest that these benefits are in any way related to the construction of schools on Indian land. Furthermore, the evidence introduced below by the State on this issue is far from clear. Although the State does provide services to the Ramah Navajo Indians, it receives federal funds for providing some of these services, and the State conceded at trial that it saves approximately $380,000 by not having to provide education for the Ramah Navajo children. App. 95, 105–106, 108.

We do not believe it necessary to adopt this new approach—the existing pre-emption analysis governing these cases is sufficiently sensitive to many of the concerns expressed by the Solicitor General. Although clearer rules and presumptions promote the interest in simplifying litigation, our precedents announcing the scope of pre-emption analysis in this area provide sufficient guidance to state courts and also allow for more flexible consideration of the federal, state, and tribal interests at issue. We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be "construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *White Mountain, supra,* at 144; see also *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S., at 174–175, and n. 13; *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U. S., at 690–691. This guiding principle helps relieve the tension between emphasizing the pervasiveness of federal regulation and the federal policy of encouraging Indian self-determination. Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future.

III

In sum, the comprehensive federal regulatory scheme and the express federal policy of encouraging tribal self-sufficiency in the area of education preclude the imposition of the state gross receipts tax in this case. Accordingly, the judgment of the New Mexico Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join, dissenting.

The Court today reproves the New Mexico Court of Appeals for failing to heed our precedents, much as a disappointed parent would rebuke a wayward child.[1] I do not think the Court of Appeals deserves the rebuke; it seems to me that the state court applied our precedents at least as faithfully, and coherently, as the Court itself. In its desire to reach a result that it evidently finds quite salutary as a matter of policy, the Court finds "indistinguishable" a case that is considerably off the mark, and it finds "pervasively regulated" an activity that is largely free of federal regulation. It ultimately accords a dependent Indian tribal organization greater tax immunity than it accorded the sovereignty of the United States a short three months ago in a case involving the precise state taxes at issue here.

I

The general question presented by this case has occupied the Court many times in the recent past, and seems destined to demand its attention over and over again until the Court sees fit to articulate, and follow, a consistent and predictable rule of law. This insistent question concerns the extent to which the States can tax economic activity on Indian reservations within their borders. I believe the dominant trend of our cases is toward treating the scope of reservation immunity from nondiscriminatory state taxation as a question of pre-emption, ultimately dependent on congressional intent. In such a framework, the tradition of Indian sovereignty stands as an independent barrier to discriminatory taxes, and otherwise serves only as a guide to the ascertainment of the congressional will.

---

[1] "Although we must admit our disappointment that the courts below apparently gave short shrift to this principle and to our precedents in this area, we cannot and do not presume that state courts will not follow both the letter and the spirit of our decisions in the future." *Ante*, at 846.

The principles announced in *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136 (1980), are consistent with this trend.[2] Thus, the Court in *White Mountain* recognized federal pre-emption as a principal barrier to the assertion of state regulatory authority over tribal reservations and members, *id.*, at 142, and specifically invalidated the challenged assertion of taxing authority on that basis, *id.*, at 148, 151, n. 15. The Court also recognized that in some instances a state law may be invalid because it infringes "'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.*, at 142 (quoting *Williams* v. *Lee*, 358 U. S. 217, 220 (1959)). But apart from those rare instances in which the State attempts to interfere with the residual sovereignty of a tribe to govern its own members, the "tradition of tribal sovereignty" merely provides a "backdrop" against which the pre-emptive effect of federal statutes or treaties must be assessed. See 448 U. S., at 143.

The Court today pays homage to these principles but then promptly bestows its favors on a new analytical framework in which the extent of economic burden on the tribe, and not the pre-emptive effect of federal regulations, appears to be the paramount consideration. Such a shift is necessary, for the

---

[2] Nevertheless, the Solicitor General has again suggested that on-reservation activities affecting resident tribes be considered presumptively beyond the reach of state law by operation of the "principle of tribal sovereignty." See Brief for United States as *Amicus Curiae* 17–24. The same suggestion was urged, and rejected, in *White Mountain*. It has proved no more appealing in this case.

Court's purported reliance on *White Mountain* will not withstand even superficial scrutiny.

II

The Court declares that "[t]his case is indistinguishable in all relevant respects from *White Mountain*." *Ante*, at 839. This statement is quite inaccurate. *White Mountain* involved an attempt by the State of Arizona to apply its motor carrier license and use fuel taxes to the logging operations of a non-Indian company doing business exclusively on the reservation. The Court concluded that application of the State's taxes was inconsistent with the pervasive federal regulation of the very activity subject to taxation. The Court repeatedly emphasized the comprehensiveness of the regulations on which it relied.

> "Under these regulations, the Bureau of Indian Affairs exercises literally daily supervision over the harvesting and management of tribal timber. In the present case, contracts between [the tribal organization] and [the non-Indian contractor] must be approved by the Bureau; indeed, the record shows that some of those contracts were drafted by employees of the Federal Government. Bureau employees regulate the cutting, hauling, and marking of timber by [the tribal organization and the contractor]. The Bureau decides such matters as how much timber will be cut, which trees will be felled, which roads are to be used, which hauling equipment [the contractor] should employ, the speeds at which logging equipment may travel, and the width, length, height, and weight of loads.
>
> "The Secretary has also promulgated detailed regulations governing the roads developed by the Bureau of Indian Affairs. . . . On the Fort Apache Reservation the Forestry Department of the Bureau has required [the tribal organization] and its contractors . . . to repair and

> maintain existing Bureau and tribal roads and in some cases to construct new logging roads. . . . A high percentage of [the contractor's] receipts are expended for those purposes, and it has maintained separate personnel and equipment to carry out a variety of tasks relating to road maintenance." 448 U. S., at 147–148.

But the Court in *White Mountain* did not merely review the comprehensiveness of the regulations and conclude, *ipso facto*, that state taxes on the logging operations were preempted. It found, with considerable attention to specifics, that "the assessment of state taxes would obstruct federal policies." *Id.*, at 148.

> "At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . .' 25 CFR § 141.3(a)(3) (1979). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe subject only to administrative expenses incurred by the Federal Government. . . .
>
> "In addition, the taxes would undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber. The Secretary reviews and approves the terms of the Tribe's agreements with its contractors, sets fees for services rendered to the Tribe by the Federal Government, and determines stumpage rates for timber to be paid to the Tribe. Most notably in reviewing or writing the terms of the contracts between [the tribal organization] and its contractors, federal agents must predict the amount and determine the proper allocation of all business expenses, including fuel costs. The assessment of state taxes would throw additional

> factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors.
>
> "Finally, the imposition of state taxes would adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law." *Id.*, at 149–150.

As noted, the Court thinks that this case is "indistinguishable in all relevant respects from *White Mountain.*" *Ante*, at 839. It finds that "[f]ederal regulation of the construction and financing of Indian educational institutions is both comprehensive and pervasive." *Ibid.* But the regulations on which the Court relies do not regulate school construction, which is the activity taxed. They merely detail procedures by which tribes may apply for federal funds in order to carry out school construction.

The purpose of the regulations, which the Court quotes only in part, *ante*, at 840–841, "*is to give the application and approval process for obtaining a contract or services from the Bureau* for school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations . . . ." 25 CFR § 274.1 (1981) (emphasis added). The regulations that follow explain the procedures by which tribes may obtain, complete, and file application forms for federal funding or services. §§ 274.12–274.18. As the Court observes, *ante*, at 841, the regulations also authorize the BIA to approve or disapprove plans and specifications for construction as well as construction contracts let by the tribe, which are treated as subcontracts of the funding contract between the tribe and the BIA. The contracts are required to contain a clause establishing a hiring preference for Indians. § 274.38. And the BIA is given access to the tribe's records for auditing purposes. § 274.41. That is the extent of the regulations.

In this case the BIA "contracted" with the School Board in order to convey federal funds for the construction project.

It also approved the Board's construction "subcontract" with the construction contractor. It played *no role* in the selection of the contractor and it played *no role* in regulating or supervising the actual construction of the school. The Court concludes that this scheme, which is little more than a grant application process, "is at least as comprehensive as the federal scheme found to be pre-emptive in *White Mountain.*" *Ante*, at 841. I simply cannot agree.

More important, the Court concludes in the very next sentence that "[t]he direction and supervision provided by the Federal Government for the construction of Indian schools leaves no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts paid to Lembke by the Board." *Ante*, at 841–842. This statement constitutes the sum total of the Court's preemption analysis in this case. In *White Mountain* the Court engaged in a detailed examination of the extent to which state taxes would interfere both with the Secretary's ability to carry out his congressional mandate and with the tribe's ability to carry out federal policy. In the place of such careful analysis, the Court today relies on *ipse dixit*. It does so because there is no realistic basis for concluding that the State's taxes would interfere with a "pervasive" regulatory scheme. The BIA simply does not regulate the construction activity which the State seeks to tax. It provides federal money to eligible tribes and tribal organizations and it establishes a contract-approval and auditing mechanism as a means of attempting to ensure that the money is put to the use for which it is earmarked.[3]

---

[3] The Court ignores other distinctions between this case and *White Mountain*. For example, the logging contractor in the latter case, although a non-Indian corporation, operated exclusively to harvest timber on the reservation; it conducted no off-reservation activities whatsoever. See 448 U. S., at 139. The contractor in this case is a general building contractor doing business throughout the State of New Mexico, and enjoying state services to the same extent as any other commercial enterprise in

III

A careful reading of the Court's opinion demonstrates that the single, determinative factor in its judgment is the fact that the challenged state taxes have increased the financial burden of constructing a tribal school. Whether the federal regulations are detailed and comprehensive or largely a matter of bookkeeping is an irrelevancy, for the Court concludes that the tax burden "impedes the clearly expressed federal interest in promoting the 'quality and quantity' of educational opportunities for Indians *by depleting the funds available for the construction of Indian schools.*" *Ante*, at 842 (emphasis added). The Court recognizes that the legal incidence of the tax is on the non-Indian contractor, but asserts that "in *White Mountain* . . . we found it significant that the economic burden of the asserted taxes would ultimately fall on the Tribe,

---

New Mexico. The Court dismisses this factor with the statement that "[p]resumably, the state tax revenues derived from Lembke's off-reservation business activities are adequate to reimburse the State for the services it provides to Lembke." *Ante*, at 844, n. 9. The Court's "presumptions," however, are no substitute for the considered judgment of the state taxing authority. Indeed, in assessing the validity of a state tax, the Court has previously recognized that the State's interests are strongest when the taxpayer is the recipient of state services. See *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 157 (1980). To the extent presumptions are relevant, the Court has inverted the one that ought to apply.

Another distinction is also relevant. The activity taxed in *White Mountain* was the exploitation of natural resources located on the reservation and devoted to the beneficial use and enjoyment of reservation Indians. Indeed, over 90% of the total profits generated by tribal enterprises were derived from the Tribe's logging operations. 448 U. S., at 138. In this case, the state taxes diminish, not the income generated by the Tribe for its own preservation and welfare, but federal funds appropriated by Congress for the purpose of school construction. No tribal funds are devoted to this endeavor, and congressional appropriations were based on funding requests that included the gross receipts tax as part of the estimated construction cost.

even though the legal incidence of the tax was on the non-Indian logging company." *Ante*, at 844, n. 8.

The Court in *White Mountain* did indeed note that "the economic burden of the asserted taxes will ultimately fall on the Tribe." 448 U. S., at 151. But in a footnote immediately following that sentence, which is today ignored, the Court declared:

> "Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted, as *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which . . . leaves no room for the additional burdens sought to be imposed by state law." *Id.*, at 151, n. 15.

Despite its references to the supposed "comprehensive and pervasive" regulatory scheme in this case, the Court clearly has chosen to bar the State from taxing Lembke's gross receipts principally because the tax imposes an indirect economic burden on the tribal organization. As the Court in *White Mountain* recognized, our precedents undeniably view that as an insufficient basis for the recognition of an Indian tax immunity. See *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U. S. 134, 156 (1980) ("Washington does not infringe the right of reservation Indians to 'make their own laws and be ruled by them,' . . . merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving"); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 481–482 (1976) (upholding tax on cigarette sales from Indians to non-Indians because the legal incidence of the tax was on the consumer); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 156–157 (1973) (refusing to imply tax immunity despite economic burden on tribal enterprise).[4] Even under the modified form of pre-emption doctrine applicable to state regulation of reservation activities, there must be some affirmative indication that Congress did not intend the State to exercise the sovereign power challenged in the suit. Until today, the mere fact that the asserted power will impose an economic burden on a tribal endeavor has not provided that affirmative indication.

---

[4] In other areas of tax immunity, the Court has steadfastly refused to assess the validity of a tax by reference to the economic burdens it imposes if

I do not disagree with the Court's judgment that congressional enactments such as the Indian Financing Act and the Indian Self-Determination and Education Assistance Act embody a federal policy encouraging the development of Indian-controlled educational institutions. But it is a considerable leap to infer from that policy the independent principle that all state laws which might increase the cost of such an endeavor are to be considered null and void. It is perfectly conceivable that Congress favored Indian education, but also contemplated that all costs of obtaining that end would be paid in a normal fashion. State taxes are as much a normal cost of school construction as the cost of cement and labor. The cost of taxes was included in the bids submitted to the Board by the construction contractors, and it apparently was also included in the funding requests submitted by the Board to Congress. The Board cannot be faulted for attempting to stretch its federal construction funds as far as possible, but that is a woefully inadequate basis for interfering with the sovereign prerogatives of the State of New Mexico.

IV

A short three months ago, this Court considered whether the State of New Mexico could impose its gross receipts and

---

those burdens are nondiscriminatory and comport with due process. See *United States* v. *New Mexico*, 455 U. S. 720 (1982) (state taxation of federal contractors); *United States* v. *County of Fresno*, 429 U. S. 452 (1977) (state taxation of Federal Government); *New York* v. *United States*, 326 U. S. 572 (1946) (federal taxation of state government); *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976) (state taxation of imports and exports).

compensating use taxes on private contractors that conduct business with the Federal Government. We concluded that tax immunity was appropriate in only one circumstance: "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States* v. *New Mexico*, 455 U. S. 720, 735 (1982). In reaching this conclusion, we held that "immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." *Id.*, at 734. If the legal incidence of the tax is on the contractor, it is to be considered valid, absent specific congressional action, as long as "the contractors can realistically be considered entities independent of the United States." *Id.*, at 738.[5]

In this case, as in *United States* v. *New Mexico*, the legal incidence of the New Mexico tax is on the private contractor, not on the entity whose status might be the source of a tax immunity. And, as in *United States* v. *New Mexico*, it is evident that Lembke is a separate taxable entity completely independent of the tribal school board. Were the tax immunity of the Tribe no greater than that of the United States, it seems plain that New Mexico's tax would have to be upheld as applied to the gross receipts of the non-Indian contractor. But the Court reaches a different conclusion because it finds that the tax imposes an economic burden on the Tribe's effort to build a school with federal funds. Thus, the Court accords an Indian Tribe, whose sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance," *United States* v. *Wheeler*, 435 U. S. 313, 323 (1978), greater immunity from state taxes than is enjoyed by the sovereignty of the United States on whom it is dependent.[6]

---

[5] We recognized one possible exception to this general rule: "In the case of a sales tax . . . it is arguable that an entity serving as a federal procurement agent can be so closely associated with the Government, and so lack an independent role in the purchase, as to make the sale—in both a real and a symbolic sense—a sale to the United States, even though the purchasing agent has not otherwise been incorporated into the Government structure." 455 U. S., at 742. In this case, there is no basis for arguing that Lembke has acted merely as a purchasing agent for the Board or the BIA.

For these reasons, I dissent from the Court's judgment.

---

[6] Of course, the Court purports to rest its decision on the pre-emptive effect of federal law. But the immunity of federal contractors from state taxes is also dependent on "generalized notions of federal supremacy." *United States* v. *New Mexico*, *supra*, at 730. The critical question, both in *United States* v. *New Mexico* and in this case, is what factors will the Court examine to determine whether the State has exceeded limits imposed by the Supremacy Clause and by Congress. I think it is evident that in the area of federal tax immunity the Court has required evidence of more than mere economic burdens before it will invalidate a state tax as applied. As this case demonstrates, tribal tax immunity may be invoked on no greater showing than the fact of economic burdens on a federally supported tribal endeavor. Since both immunities derive from precisely the same source—the supremacy of federal law—I find the Court's decision today inexplicable. "With the abandonment of the notion that the economic—as opposed to the legal—incidence of the tax is relevant, it becomes difficult to maintain that federal tax immunity is designed to insulate federal operations from the effects of state taxation." *United States* v. *New Mexico*, *supra*, at 735, n. 11.

UNITED STATES *v.* VALENZUELA-BERNAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-450. Argued April 20, 1982—Decided July 2, 1982

Respondent was indicted in Federal District Court for transporting one Romero-Morales in violation of 8 U. S. C. § 1324(a)(2), which prohibits the knowing transportation of an alien illegally in the United States who last entered the country within three years prior to the date of the transportation. Two other illegal aliens—who, with Romero-Morales, were passengers in the car being driven by respondent and were apprehended with respondent—were deported after an Assistant United States Attorney concluded that they possessed no evidence material to respondent's prosecution. Romero-Morales was detained to provide a nonhearsay basis for establishing that respondent had violated § 1324(a)(2). The District Court denied respondent's motion to dismiss the indictment on the asserted ground that the deportation of the other passengers deprived him of the opportunity to interview them to determine whether they could aid in his defense and thus violated his Fifth Amendment right to due process and his Sixth Amendment right to compulsory process for obtaining witnesses. Following a bench trial respondent was convicted, but the Court of Appeals reversed, holding that although a constitutional violation occurs only when "the alien's testimony could conceivably benefit the defendant," the "conceivable benefit" test was satisfied—without requiring the defendant to explain what beneficial evidence would have been provided by the alien—whenever, as here, the deported alien was an eyewitness to the crime.

Held: Respondent failed to establish a violation of the Fifth or Sixth Amendment. Pp. 863-874.

(a) In cases like this, the Executive Branch's responsibility faithfully to execute Congress' immigration policy of prompt deportation of illegal aliens justifies deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. In addition to satisfying such policy, the prompt deportation of such witnesses is justified by practical considerations, including the financial and physical burdens imposed upon the Government in detaining alien eyewitnesses. Pp. 863-866.

(b) Respondent cannot establish a violation of the Sixth Amendment, which guarantees a criminal defendant the right to compulsory process for obtaining witnesses "in his favor," merely by showing that deportation of the aliens deprived him of their testimony. He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense. Cf. *Washington* v. *Texas*, 388 U. S. 14. While a relaxation of the specificity required in showing materiality may be supported by the fact that, because the witnesses were deported, neither respondent nor his attorney had an opportunity to interview the witnesses to determine what favorable information they possessed, this does not afford a basis for wholly dispensing with a showing of materiality. Cf. *Roviaro* v. *United States*, 353 U. S. 53. Moreover, respondent was present throughout the commission of the crime, and no one knew better than he what the deported witnesses said in his presence that might bear upon whether he knew that Romero-Morales was an illegal alien who had entered the country within the past three years. Pp. 867–871.

(c) At least the same materiality requirement obtains with respect to a due process claim. In order to establish a denial of due process, the acts complained of must be of such quality as necessarily prevents a fair trial. Such an absence of fairness is not made out by the Government's deportation of the witnesses here unless there is some explanation of how their testimony would have been favorable and material. P. 872.

(d) Sanctions against the Government are warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact. In this case, respondent made no effort to explain what material, favorable evidence the deported aliens would have provided for his defense. Pp. 872–874.

647 F. 2d 72, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., *post*, p. 874, and O'CONNOR, J., *post*, p. 875, filed opinions concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 879.

Carter G. Phillips argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Jensen*, and *Deputy Solicitor General Frey*.

Eugene G. Iredale argued the cause for respondent. With him on the brief were *John J. Cleary* and *Craig E. Weinerman*.

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent, a citizen of Mexico, was indicted in the United States District Court for the Southern District of California for transporting one Romero-Morales in violation of 8 U. S. C. § 1324(a)(2). That section generally prohibits the knowing transportation of an alien illegally in the United States who last entered the country within three years prior to the date of the transportation.[1] Respondent was found guilty after a bench trial, but his conviction was overturned by the United States Court of Appeals for the Ninth Circuit. That court held that the action of the Government in deporting two aliens other than Romero-Morales violated respondent's right under the Sixth Amendment to the United States Constitution to compulsory process, and his right under the Fifth Amendment to due process of law. We granted certiorari in order to review the Court of Appeals' application of these constitutional provisions to this case, 454 U. S. 963 (1981),[2] and we now reverse.

I

Respondent entered the United States illegally on March 23, 1980, and was taken by smugglers to a house in Escondido, Cal. Six days later, in exchange for his not having to pay the smugglers for bringing him across the border, respondent agreed to drive himself and five other passengers to Los Angeles. When the car which respondent was driving approached the Border Patrol checkpoint at Temecula, agents noticed the five passengers lying down inside the car and motioned to respondent to stop. Respondent accelerated through the checkpoint and was chased at high speed for approximately one mile before stopping the car and fleeing on foot along with the five passengers. Three of the passengers and respondent were apprehended by the Border Patrol agents.

---

[1] Section 1324(a)(2) applies to "[a]ny person" who "transports, or moves, or attempts to transport or move," "any alien," "knowing that [the alien] is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior" to the transportation or attempted transportation with which the person is charged.

[2] Other Courts of Appeals have adopted slight variations of the position held by the Court of Appeals for the Ninth Circuit. See, *e. g.*, *United States* v. *Armijo-Martinez*, 669 F. 2d 1131 (CA6 1982); *United States* v. *Rose*, 669 F. 2d 23 (CA1 1982); *United States* v. *Avila-Dominguez*, 610 F. 2d 1266 (CA5 1980); *United States* v. *Calzada*, 579 F. 2d 1358 (CA7 1978).

Following their arrest, respondent and the other passengers were interviewed by criminal investigators. Respondent admitted his illegal entry into the country and explained his reason for not stopping at the checkpoint: "I was bringing the people [and] I already knew I had had it—too late—it was done." App. 27. The three passengers also admitted that they were illegally in the country and each identified respondent as the driver of the car. *Id.*, at 66. An Assistant United States Attorney concluded that the passengers possessed no evidence material to the prosecution or defense of respondent for transporting illegal aliens, and two of the passengers were deported to Mexico. The third, Enrique Romero-Morales, was detained to provide a nonhearsay basis for establishing that respondent had transported an illegal alien in violation of 8 U. S. C. § 1324(a)(2).

Respondent moved in the District Court to dismiss the indictment, claiming that the Government's deportation of the two passengers other than Romero-Morales violated his Fifth Amendment right to due process of law and his Sixth Amendment right to compulsory process for obtaining favorable witnesses. He claimed that the deportation had deprived him of the opportunity to interview the two remaining passengers to determine whether they could aid in his defense. Although he had been in their presence throughout the allegedly criminal activity, respondent made no attempt to explain how the deported passengers could assist him in proving that he did not know that Romero-Morales was an illegal alien who had last entered the United States within the preceding three years.

At least one evidentiary hearing was held on respondent's motion, at which Romero-Morales testified that he had not spoken to respondent during the entire time that they were together. At the same hearing the Government offered, without obtaining agreement by respondent, to stipulate that none of the passengers in the car told respondent that they were in the United States illegally. The District Court denied respondent's motion and, following a bench trial on stipulated evidence, found respondent guilty as charged.[3]

The Court of Appeals reversed the conviction. The court relied upon the rule, first stated in *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (CA9 1971), that the Government violates the Fifth and Sixth Amendments when it deports alien witnesses before defense counsel has an opportunity to interview them. 647 F. 2d 72, 73–75 (1981). Although it stated that a constitutional violation occurs only when "the alien's testimony could conceivably benefit the defendant," *id.*, at 74, the court's application of the "conceivable benefit" test demonstrated that the test will be satisfied whenever the deported aliens were eyewitnesses to the crime.[4] Respond-

---

[3] The joint appendix contains excerpts of transcribed testimony from a hearing on June 2, 1980, at which the District Court heard arguments of counsel and the testimony of Romero-Morales. At the conclusion of this testimony, counsel for respondent proposed the highly unusual step of calling the Assistant United States Attorney as a witness. App. 45. The attorney testified at further proceedings held on June 12, 1980, and was interrogated, *inter alia*, about his understanding of various decisions of the Court of Appeals for the Ninth Circuit and about the Government's litigating strategy in these cases. *Id.*, at 63–64. This procedure seems to us highly unusual, if not bizarre; ordinarily the litigating strategies of the United States Attorney are no more the subject of permissible inquiry by his opponent than would be the litigating strategies of the Public Defender by his opponent.

[4] As the Court of Appeals explained:

"The conceivable benefit in *Mendez-Rodriguez* stemmed from the fact that the deported aliens were eyewitnesses to, and active participants in, the crime charged, so that there was a strong possibility that they could have provided material and relevant evidence concerning the events constituting the crime. Conversely, where a missing deported alien was not an ent's failure to explain what beneficial evidence would have been provided by the two passengers was thus inapposite, for "the deported aliens were eyewitnesses to, and active participants in, the crime charged, thus establishing a strong possibility that they could have provided material and relevant information concerning the events constituting the crime." *Id.*, at 75. Accordingly, the Court of Appeals held that respondent's motion to dismiss the indictment should have been granted by the District Court.

II

We think that the decision of the Court of Appeals in this case, and some of the additional arguments made in support of it by respondent, misapprehend the varied nature of the duties assigned to the Executive Branch by Congress. The Constitution imposes on the President the duty to "take Care that the Laws be faithfully executed." U. S. Const., Art. II, § 3. One of the duties of the Executive Branch, and a vitally important one, is that of apprehending and obtaining the conviction of those who have violated criminal statutes of the United States. The prosecution of respondent is of course one example of the Executive's effort to discharge that responsibility.

---

eyewitness to the offense, we have been unwilling to assume that the alien's testimony could conceivably benefit the defendant." 647 F. 2d, at 74 (citation and footnotes omitted).

As described by the Court of Appeals, the "conceivable benefit" test "impose[s] no requirement of government misconduct or negligence before dismissal of an indictment is warranted. Nor is a defendant required to show specific prejudice caused by the unavailability of the alien eyewitnesses." *Ibid.* (citation omitted). Other Courts of Appeals have recognized the Ninth Circuit rule as requiring no showing of prejudice, *United States* v. *Calzada*, 579 F. 2d, at 1362, and as permitting dismissal of the indictment even when the "'record is completely devoid of anything which would suggest that the testimony of any one, or more, of the deported persons would have been helpful' to the defendants." *United States* v. *Avila-Dominguez*, 610 F. 2d, at 1269–1270 (quoting *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1, 6 (CA9 1971) (Kilkenny, J., dissenting)).

But the Government is charged with a dual responsibility when confronted with incidents such as that which resulted in the apprehension of respondent. One or more of the persons in the car may have violated the criminal laws enacted by Congress; but some or all of the persons in the car may also be subject to deportation as provided by Congress. The Government may, therefore, find itself confronted with the obligation of prosecuting persons in the position of respondent on criminal charges, and at the same time obligated to deport other persons involved in the event in order to carry out the immigration policies that Congress has enacted.

The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government. See *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976). "The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens.'" *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972) (quoting *Boutilier* v. *INS*, 387 U. S. 118, 123 (1967)). In exercising this power, Congress has adopted a policy of apprehending illegal aliens at or near the border and deporting them promptly. Border Patrol agents are authorized by statute to make warrantless arrests of aliens suspected of "attempting to enter the United States in violation of . . . law," 8 U. S. C. § 1357(a)(2), and are directed to examine them without "unnecessary delay" to determine whether "there is prima facie evidence establishing" their attempted illegal entry. 8 CFR § 287.3 (1982). Aliens against whom such evidence exists may be granted immediate voluntary departure from the country. See 8 U. S. C. § 1252(b); 8 CFR § 242.5(a)(2)(i) (1982). Thus, Congress has determined that prompt deportation, such as occurred in this case, constitutes the most effective method for curbing the enormous flow of illegal aliens across our southern border.[5]

---

[5] As evidence of the effectiveness of Congress' policy and of the colossal problem presented by illegal entries from Mexico, the United States notes that approximately one million illegal aliens were detained by Border Pa-

In addition to satisfying immigration policy, the prompt deportation of alien witnesses who are determined by the Government to possess no material evidence relevant to a criminal trial is justified by several practical considerations. During fiscal year 1979, almost one-half of the more than 11,000 inmates incarcerated in federal facilities in the Southern District of California were material witnesses who had neither been charged with nor convicted of a criminal offense. App. 18. The average period of detention for such witnesses exceeded 5 days, and many were detained for more than 20 days. *Id.*, at 20. The resulting overcrowded conditions forced the Government to house many detainees in federal facilities located outside the Southern District of California or in state-operated jails. *Id.*, at 21–22; Brief for United States 19. Thus, the detention of alien eyewitnesses imposes substantial financial and physical burdens upon the Government, not to mention the human cost to potential witnesses who are incarcerated though charged with no crime. In addition, the rule adopted by the Court of Appeals significantly constrains the Government's prosecutorial discretion. As explained by the United States:

> "Because of budget limitations and the unavailability of adequate detention facilities, it is simply impossible as a practical matter to prosecute many cases involving the transportation or harboring of large numbers of illegal aliens, where all the aliens must be incarcerated for a substantial period of time to avoid dismissal of the charges, even though the prosecution's case may be overwhelming. As a consequence, many valid and appropriate prosecutions are foregone." *Id.*, at 21–22.

It simply will not do, therefore, to minimize the Government's dilemma in cases like this with statements such as "[t]he prosecution may not deny access to a witness by hiding

---

trol officials during each of the three years preceding 1981. Brief for United States 19; see U. S. Department of Justice, Internal Audit Report, U. S. Border Patrol Management of the Mexican Border 1, 6 (Jan. 1981).

him out. See *Freeman* v. *State of Georgia*, 599 F. 2d 65 (5th Cir. 1979) (police detective concealed location of witness)." Brief for Respondent 35. Congress' immigration policy and the practical considerations discussed above demonstrate that the Government had good reason to deport respondent's passengers once it concluded that they possessed no evidence relevant to the prosecution or the defense of respondent's criminal charge. No onus, in the sense of "hiding out" or "concealing" witnesses, attached to the Government by reason of its discharge of the obligations imposed upon it by Congress; its exercise of these manifold responsibilities is not to be judged by standards which might be appropriate if the Government's only responsibility were to prosecute criminal offenses.

III

Viewing the Government's conduct in this light, we turn to the evaluation of the Court of Appeals' "conceivable benefit" test. There seems to us to be little doubt that this test is a virtual "*per se*" rule which requires little if any showing on the part of the accused defendant that the testimony of the absent witness would have been either favorable or material. As we said with respect to a similar test—phrased in terms of information "that might affect the jury's verdict"—for determining when a prosecutor must disclose information to a criminal defendant:

> "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." *United States* v. *Agurs*, 427 U. S. 97, 109 (1976).

So it is with the "conceivable benefit" test. Given the vagaries of a typical jury trial, it would be a bold statement indeed to say that the testimony of any missing witness could not have "conceivably benefited" the defense. To us, the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel.[6]

A

The only recent decision of this Court dealing with the right to compulsory process guaranteed by the Sixth Amendment suggests that more than the mere absence of testimony is necessary to establish a violation of the right. See *Washington* v. *Texas*, 388 U. S. 14 (1967). Indeed, the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him "compulsory process for obtaining *witnesses in his favor*." U. S. Const., Amdt. 6 (emphasis added). In *Washington*, this Court found a violation of this Clause of the Sixth Amendment when the defendant was arbitrarily deprived of "testimony [that] would have been *relevant* and *material*, and . . . *vital* to the defense." 388 U. S., at 16 (emphasis added). This language suggests that respondent cannot establish a violation of his constitutional right to compulsory process merely by showing that deportation of the passengers deprived him of their testimony. He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense.[7]

When we turn from *Washington* to other cases in what might loosely be called the area of constitutionally guaranteed access to evidence, we find *Washington*'s intimation of a materiality requirement more than borne out. *Brady* v. *Maryland*, 373 U. S. 83 (1963), held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. This materiality requirement was emphasized in *Moore* v. *Illinois*, 408 U. S. 786 (1972), where we stated that a defendant will prevail upon a *Brady* claim "where the evidence is favorable to the accused and is material either to guilt or to punishment." *Id.*, at 794. And in *United States* v. *Agurs*, *supra*, we noted that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.*, at 104. We further explained:

---

[6] See n. 4, *supra*.

[7] That the Sixth Amendment does not guarantee criminal defendants the right to compel the attendance of any and all witnesses is reflected in the Federal Rules of Criminal Procedure. Rule 17(b) requires the Government to subpoena witnesses on behalf of indigent defendants, but only "upon a satisfactory showing . . . that the presence of the witness is necessary to an adequate defense." See also *Isaacs* v. *United States*, 159 U. S. 487, 489 (1895); *Crumpton* v. *United States*, 138 U. S. 361, 364–365 (1891).

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. . . . This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.*, at 112–113 (footnotes omitted).

Similarly, when the Government has been responsible for delay resulting in a loss of evidence to the accused, we have recognized a constitutional violation only when loss of the evidence prejudiced the defense. In *United States* v. *Marion*, 404 U. S. 307 (1971), for example, the Court held that preindictment delay claims were governed by the Due Process Clause of the Fifth Amendment, not by the speedy-trial guarantee of the Sixth Amendment. Elaborating on the nature of the guarantee provided by the Due Process Clause in such cases, the Court emphasized the requirement of materiality:

> "Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *Id.*, at 325.

Five Terms later, in *United States* v. *Lovasco*, 431 U. S. 783 (1977), we summarized this aspect of *Marion:*

> "Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.*, at 790.

The same "prejudice" requirement has been applied to cases of postindictment delay. In *Barker* v. *Wingo*, 407 U. S. 514 (1972), the Court set forth several factors to be considered in determining whether an accused has been denied his Sixth Amendment right to a speedy trial by the Government's pretrial delay. One of the four factors identified by the Court, and a factor more fully discussed in *United States* v. *MacDonald*, 435 U. S. 850, 858–859 (1978), was whether there had been any "prejudice to the defendant from the delay." *Id.*, at 858. Although the Court recognized that prejudice may take the form of "'oppressive pretrial incarceration'" or "'anxiety and concern of the accused,'" the "'most serious'" consideration, analogous to considerations in this case, was impairment of the ability to mount a defense. See *ibid.* (quoting *Barker* v. *Wingo*, *supra*, at 532). Thus, other interests protected by the Sixth Amendment look to the degree of prejudice incurred by a defendant as a result of governmental action or inaction.

The principal difference between these cases in related areas of the law and the present case is that respondent simply had no access to the witnesses who were deported after he was criminally charged. Respondent contends that requiring him to show materiality is unreasonable in light of the fact that neither he nor his attorney was afforded an opportunity to interview the deported witnesses to determine what favorable information they possessed. But while this difference may well support a relaxation of the specificity required in showing materiality, we do not think that it affords the basis for wholly dispensing with such a showing.

The closest case in point is *Roviaro* v. *United States*, 353 U. S. 53 (1957). While *Roviaro* was not decided on the basis of constitutional claims, its subsequent affirmation in *McCray* v. *Illinois*, 386 U. S. 300 (1967), where both due process and confrontation claims were considered by the Court, suggests that *Roviaro* would not have been decided differently if those claims had actually been called to the Court's attention.

Roviaro deals with the obligation of the prosecution to disclose to the defendant the name of an informer-eyewitness, and was cast in terms of the traditional governmental privilege to refuse disclosure of such an identity. The *Roviaro* Court held that the informer's identity had to be disclosed, but only after it concluded that the informer's testimony would be highly relevant:

> "This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that [the informer] denied knowing petitioner or ever having seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of re-

> peated demands by the accused for his disclosure." 353 U. S., at 64–65.

"What *Roviaro* thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity," *McCray* v. *Illinois*, *supra*, at 311, despite the fact that criminal defendants otherwise have no access to such informers to determine what relevant information they possess. *Roviaro* supports the conclusion that while a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality, the task is not an impossible one. In such circumstances it is of course not possible to make any avowal of *how* a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality.

In addition, it should be remembered that respondent was present throughout the commission of this crime. No one knows better than he what the deported witnesses actually said to him, or in his presence, that might bear upon whether he knew that Romero-Morales was an illegal alien who had entered the country within the past three years. And, in light of the actual charge made in the indictment, it was only the status of Romero-Morales which was relevant to the defense. Romero-Morales, of course, remained fully available for examination by the defendant and his attorney. We thus conclude that the respondent can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the testimony of the deported witnesses.[8]

---

[8] Respondent's knowledge of the truth distinguishes this case from *United States* v. *Burr*, 25 F. Cas. 187 (No. 14,694) (CC Va. 1807), a case cited by respondent in support of his argument that it is unreasonable to require him to explain the relevance of the missing testimony. In *Burr*, Chief Justice Marshall found it unreasonable to require Aaron Burr to explain the relevancy of General Wilkinson's letter to President Jefferson,

B

Having borrowed much of our reasoning with respect to the Compulsory Process Clause of the Sixth Amendment from cases involving the Due Process Clause of the Fifth Amendment, we have little difficulty holding that at least the same materiality requirement obtains with respect to a due process claim. Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba* v. *California*, 314 U. S. 219, 236 (1941). In another setting, we recognized that Jencks Act violations, wherein the Government withholds evidence required by statute to be disclosed, rise to the level of due process violations only when they so infect the fairness of the trial as to make it "more a spectacle or trial by ordeal than a disciplined contest." *United States* v. *Augenblick*, 393 U. S. 348, 356 (1969) (citations omitted). Such an absence of fairness is not made out by the Government's deportation of the witnesses in this case unless there is some explanation of how their testimony would have been favorable and material. See *United States* v. *Lovasco*, 431 U. S. 783 (1977); *United States* v. *Marion*, 404 U. S. 307 (1971).

IV

To summarize, the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. The mere fact that the Government

---

upon which the President's allegations of treason were based, precisely because Burr had never read the letter and was unaware of its contents. In this case, respondent observed the passengers, heard their comments, and is fully aware of the ways in which they influenced his knowledge about the status of Romero-Morales.

deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense.

Because prompt deportation deprives the defendant of an opportunity to interview the witnesses to determine precisely what favorable evidence they possess, however, the defendant cannot be expected to render a detailed description of their lost testimony. But this does not, as the Court of Appeals concluded, relieve the defendant of the duty to make some showing of materiality. Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses. In some cases such a showing may be based upon agreed facts, and will be in the nature of a legal argument rather than a submission of additional facts. In other cases the criminal defendant may advance additional facts, either consistent with facts already known to the court or accompanied by a reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of a deported witness would have been material and favorable to his defense.[9] Because in the latter situation the explanation of materiality is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney. See Fed. Rule Evid. 603; Fed. Rule Crim. Proc. 47.

As in other cases concerning the loss of material evidence, sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact. See *Giglio* v. *United States*, 405 U. S. 150, 154 (1972). In making such a determination, courts should afford some leeway for the fact that the defendant necessarily proffers a description of the material evidence rather than the evidence itself. Because determinations of materiality are often best made in light of all of the evidence adduced at trial, judges may wish to defer ruling on motions until after the presentation of evidence.[10]

---

[9] In adopting this standard, we express no opinion on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance at his criminal trial of witnesses within the United States.

In this case the respondent made no effort to explain what material, favorable evidence the deported passengers would have provided for his defense. Under the principles set forth today, he therefore failed to establish a violation of the Fifth or Sixth Amendment, and the District Court did not err in denying his motion to dismiss the indictment. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment of the Court essentially for the reasons set forth by Judge Roney, in writing for a panel of the former Fifth Circuit, in *United States* v. *Avila-Dominguez*, 610 F. 2d 1266, 1269–1270, cert. denied *sub nom. Perez* v. *United States*, 449 U. S. 887 (1980). At least a "plausible theory" of how the testimony of the deported witnesses would be helpful to the defense must be offered. None was advanced here; therefore, the motion to dismiss the indictment was properly denied by the District Court.

---

[10] The counsel of *United States* v. *Agurs*, 427 U. S. 97, 112–113 (1976), is helpful here:

"[T]he omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

JUSTICE O'CONNOR, concurring in the judgment.

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington* v. *Texas*, 388 U. S. 14, 19 (1967).

In short, the right to compulsory process is essential to a fair trial. Today's decision, I fear, may not protect adequately the interests of the prosecution and the defense in a fair trial, and may encourage litigation over whether the defendant has made a "plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense." *Ante*, at 873. A preferable approach would be to accommodate *both* the Government's interest in prompt deportation of illegal aliens *and* the defendant's need to interview alien witnesses in order to decide which of them can provide material evidence for the defense. Through a suitable standard, imposed on the federal courts under our supervisory powers, a practical accommodation can be reached without any increase in litigation.

I

One cannot discount the importance of the Federal Government's role in the regulation of immigration.[1] As the Court points out, Congress and the Immigration and Naturalization Service, the agency authorized to make such policy decisions, have decided that prompt deportation is the appropriate response to the tremendous influx of illegal aliens. *Ante*, at 864. The Court is also correct that the Federal Government has legitimate reasons for reducing the number of illegal aliens detained for possible use as material witnesses. Particularly because most of the detained aliens are never called to testify, we should be careful not to permit either needless human suffering or excessive burdens on the Federal Government. Under these circumstances, courts should be especially circumspect about interfering with congressional judgments.

---

[1] Article I, § 8, cl. 4, states that Congress shall have the power "To establish an uniform Rule of Naturalization." See *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"); *Galvan* v. *Press*, 347 U. S. 522, 531 (1954) ("that the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government").

Nevertheless, the constitutional obligation of the Executive to "take Care that the Laws be faithfully executed," U. S. Const., Art. II, §3, including the immigration laws, does not lessen the importance of affording the defendant the "fundamental fairness" inherent in due process, *Lisenba* v. *California*, 314 U. S. 219, 236 (1941). Moreover, the defendant's express right in the Sixth Amendment to compel the testimony of "witnesses in his favor," requires recognition of the importance, both to the individual defendant and to the integrity of the criminal justice system, of permitting the defendant the opportunity to interview eyewitnesses to the alleged crime. A governmental policy of deliberately putting potential defense witnesses beyond the reach of compulsory process is not easily reconciled with the spirit of the Compulsory Process Clause.

II

The Court's solution to this apparent conflict between the Executive's duty to enforce the immigration laws and its duty not to impair the defendant's rights to due process and compulsory process is to permit the Government to deport potential alien witnesses, and to put the burden on the defendant of making a plausible showing that the deported aliens would have provided material and relevant evidence. The Court's approach thus permits the Government to make a practice of deporting alien witnesses immediately, taking only the risk that the defendant will be able to show that the deported witnesses, whom the defendant's counsel never will be able to interview, would have provided useful testimony. In effect, to the extent that the Government has conflicting obligations, the defendant is selected to carry the burden of their resolution.

As the Court poses the issue today, the only alternatives are either to (1) permit routine deportation of witnesses and require the defendant to make some showing of prejudice, or (2) delay deportation so that defense counsel can interview the potential witnesses, and provide for automatic dismissal of the indictment if the witnesses are deported. There is, however, another alternative that would avoid unduly burdening either the Government or the defendant. The Court could require that deportation of potential alien witnesses be delayed for a very brief interval to allow defense counsel, as well as the Government, to interview them. That approach is somewhat similar to the Ninth Circuit's practice, originally described in *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (1971). Under the holding in that case, illegal alien witnesses were held in custody for a short period, an average of five days, following the appointment of counsel. During that time, defense counsel had the opportunity to interview the witnesses and determine whether any of them might provide material and relevant evidence. Following the interviews, a Federal Magistrate held a hearing to determine whether any of the witnesses could provide material evidence, and ordered deportation of those aliens who could not provide such testimony. On those occasions when the Government nevertheless deported potential witnesses before the materiality hearing was held, the District Court determined whether the deported witnesses could have been of some "conceivable benefit" to the defendant. If the defendant met that standard, the court dismissed the indictment.

The principal difficulty with the Ninth Circuit's approach was, as the Court notes, *ante*, at 866–867, that it required virtually no evidence that the deported witness' testimony would have been material to the defense. Under the Ninth Circuit's formulation, the Government's deportation of an alien witness resulted in virtually an automatic dismissal of the indictment.

In adopting a standard requiring brief detention of potential alien witnesses, the Court need not take so extreme a position. In *United States* v. *Avila-Dominguez*, 610 F. 2d 1266 (1980), for example, the Fifth Circuit followed the Ninth Circuit's rationale in concluding that a defendant's constitutional rights are violated if the Government deports an alien witness before the defendant has had an opportunity to interview him. The court nevertheless affirmed the defendant's conviction because he could not offer a "plausible theory" explaining how the witness' testimony would have been helpful to the defense. *Id.*, at 1270. The court thus adopted a more stringent test than the Ninth Circuit's "conceivable benefit" test.

The standard I propose is an amalgam of the approaches used by the Fifth and Ninth Circuits.[2] As a matter of course, the deportable aliens who are potential witnesses should be detained for a very brief period to afford Government and defense counsel the opportunity to interview them. If, within that period, the defendant requests that certain aliens not be deported, a federal magistrate should hold a hearing to determine whether deportation of any of the witnesses should be deferred until after trial. As evidenced by the statistics provided by the respondent, similar procedures in the Ninth Circuit have produced very little litigation. See Brief for Respondent 30. Of course, the Government could be expected to abide by such a rule, but in the occasional event that it deports alien witnesses without affording the defendant any opportunity to interview them, the defendant should not be entitled to an automatic dismissal of the indictment; nor should the defendant be expected to prove prejudice—after all, the Government has deported his potential witnesses. Instead, I agree with the Court that sanctions should be available against the Government if the defendant sets forth some plausible theory explaining how the deported witnesses would have provided material evidence that was not simply cumulative of evidence readily available to the defendant.

---

[2] This Court has not hesitated to use its supervisory power over federal courts to set standards to ensure the fair administration of justice. For example, in *McCarthy* v. *United States*, 394 U. S. 459, 468–472 (1969), this Court, under its supervisory power, held that when a district court does not comply fully with Federal Rule of Criminal Procedure 11 in accepting a guilty plea, the plea must be set aside and the case remanded for the defendant to enter a new plea. The Court expressly rejected the rule, adopted by some Circuits, of holding a hearing to determine whether the defendant had entered his plea voluntarily with an understanding of the charge. See also *Marshall* v. *United States*, 360 U. S. 310, 313 (1959) (using this Court's "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts" in setting aside a criminal conviction because several jurors had read inadmissible news accounts of the defendant's past activities).

III

In the case before us, the respondent made no plausible suggestion that the deported aliens possessed any material evidence that was not merely cumulative of other evidence. Under the standard I have proposed, the District Court properly denied the respondent's motion to dismiss the indictment. Accordingly, I concur in the judgment of the Court.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today's holding flaunts a transparent contradiction. On the one hand, the Court recognizes respondent's constitutional right, under the Compulsory Process Clause of the Sixth Amendment, to the production of all witnesses whose testimony would be relevant and material to his defense. *Ante*, at 867–869. But on the other hand, the Court holds that the Government may deport illegal-alien eyewitnesses to respondent's alleged crime immediately upon their apprehension, before respondent or his attorney have had any opportunity to interview them—thus depriving respondent of the surest and most obvious means by which he could establish the materiality and relevance of such witnesses' testimony. *Ante*, at 872–873. Truly, the Court giveth, and the Court taketh away. But surely a criminal defendant has a constitutional right to interview eyewitnesses to his alleged crime before they are whisked out of the country by his prosecutor. The Court's decision today makes a mockery of that right. Accordingly, I dissent.

The premise of the Court's holding is that "the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses," *ante*, at 872; this governmental power is conditioned only upon the Executive's "good-faith determination" that those witnesses possess "no evidence favorable to the defendant in a criminal prosecution," *ibid.* The Court sets up this asserted "responsibility" of the Executive Branch as a counterweight to its responsibility for "apprehending and obtaining the conviction of those who have violated criminal statutes of the United States." *Ante*, at 863. Thus the Court presents this case as involving a governmental "dilemma," *ante*, at 865, in which the Executive Branch is caught between the conflicting demands of its "dual responsibility," *ante*, at 864. This supposed "dilemma" is a pure figment of the Court's imagination, repudiated by our precedents and by common sense.

The Executive Branch has many responsibilities, any of which may conflict with its duty to enforce the federal criminal law. For example, the Executive Branch has an obvious and imperative obligation to preserve the national security. But when the Executive Branch chooses to prosecute a violation of federal law, it incurs a constitutional responsibility manifestly superior to its other duties: namely, the responsibility to ensure that the accused receives the due process of law. The Government simply cannot be heard to argue that the criminal defendant's rights may be infringed because of the Executive Branch's "other responsibilities": Given the vast and manifold character of those responsibilities, to accept such an argument would be to accede to the rapid evisceration of the constitutional rights of the accused.

This point is hardly a novel one. In *Jencks* v. *United States*, 353 U. S. 657 (1957), we noted that "the protection of vital national interests may militate against public disclosure of documents in the Government's possession." *Id.*, at 670. But at the same time we noticed:

> "[I]n criminal causes, '. . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . .'" *Id.*, at 671, quoting *United States* v. *Reynolds*, 345 U. S. 1, 12 (1953).

We also quoted with approval from the opinion of the Court of Appeals for the Second Circuit in *United States* v. *Andolschek*, 142 F. 2d 503 (1944), in which Judge Learned Hand said:

> "While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the docu-

> ments may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *Id.*, at 506.[1]

The principle affirmed in these precedents is directly applicable to this case. Of course, the Government has a responsibility to execute our national immigration policy. But that responsibility does not conflict in the smallest degree with the Government's "duty to see that justice is done" to the criminal defendant whom it has chosen to prosecute. If the Government wishes to pursue criminal remedies against the accused, then its other "responsibilities" must yield before the rights to which an accused is constitutionally entitled.

Of course, the Government's duty to enforce the immigration laws should not be deferred indefinitely. But no inordinate delay is necessary in cases such as the one before us. The Southern District of California long ago adopted a procedure to enforce the *Mendez-Rodriguez* doctrine announced by the Court of Appeals for the Ninth Circuit in 1971.[2] The Southern District's procedure represents a practical and sensitive accommodation between a criminal defendant's constitutional rights under the Compulsory Process Clause and the Government's policy of prompt deportation of illegal aliens. Under that procedure, illegal-alien eyewitnesses are held in custody for a short period of time—about 10 days—after appointment of counsel for the criminal defendant. At the end of that period, the United States magistrate holds a material witness bail review hearing, pursuant to 18 U. S. C. § 3149. In the intervening time, counsel for the defendant may interview the witnesses, and determine whether they can provide testimony material to the defense. At the hearing, both prosecution and defense are required to show the materiality of each of the detained witnesses, or they are released and deported. Brief for Respondent 6–7; Brief for United States 13–14, 18. If this traditional Southern District procedure had been adhered to in the present case, the Government would have clearly discharged its constitutional obligation to afford respondent an opportunity to develop evidence bearing upon the materiality of the testimony of the witnesses to his alleged offense. In contrast, the Court permits the Government to adopt a wholly unilateral procedure that deprives respondent and future criminal defendants of any such opportunity.

---

[1] See *United States* v. *Beekman*, 155 F. 2d 580, 583–584 (CA2 1946). See also *United States* v. *Burr*, 25 F. Cas. 187, 191 (No. 14,694) (CC Va. 1807) ("If this might be likened to a civil case, the law is express on the subject. It is that either party may require the other to produce books or writings in their possession or power, which contain evidence pertinent to the issue. . . . [I]f the order be disobeyed by the plaintiff, judgment as in the case of a nonsuit may be entered against him"); *United States* v. *Nixon*, 418 U. S. 683, 709 (1974) ("To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or the defense").

[2] See *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (CA9 1971).

The Court suggests that a criminal defendant should be able to "demonstrate either the presence or absence of the required materiality" even without having had an opportunity to interview the detained eyewitnesses. *Ante*, at 871. But this notion has been flatly rejected by our precedents. *Roviaro* v. *United States*, 353 U. S. 53 (1957), denied the Government's claimed privilege to withhold the identity of its informer, "John Doe," from the petitioner.[3] Roviaro, like respondent in the present case, was "present throughout the commission of this crime." *Ante*, at 871; see 353 U. S., at 64 ("So far as [Roviaro] knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted"). But the Court in *Roviaro* refused to say, as the Court does today, that a criminal defendant "can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the testimony" that he seeks. *Ante*, at 871. Rather, the Court in *Roviaro* required disclosure simply because John Doe's testimony "*might* have been helpful to the defense." 353 U. S., at 63–64 (emphasis added).

---

[3] *Roviaro* represented an exercise of our supervisory jurisdiction. See *McCray* v. *Illinois*, 386 U. S. 300, 309 (1967). But as the Court concedes, *ante*, at 870, *Roviaro* would not have been decided differently if the Due Process and Confrontation Clause claims implicit in that case had been brought to the fore.

> "Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or the identity of the package [of heroin]. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' . . . to John Doe's car. The desirability of calling John Doe as a witness, *or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.*" *Id.*, at 64 (emphasis added).

Like Doe in *Roviaro*, the illegal aliens deported by the Government in the present case "played a prominent part" in respondent's alleged offense—if, indeed, they did not help to set it up without the knowledge of respondent. And they, like Doe, might have testified to respondent's "possible lack of knowledge" respecting essential elements of the crime charged against him.[4] Under *Roviaro*, *respondent*, not the

---

[4] In order to obtain a conviction under 8 U. S. C. § 1324(a)(2), quoted *ante*, at 860, n. 1, the Government was required to show (1) that respondent transported an alien within the United States, (2) that the alien had not been lawfully admitted or was not lawfully entitled to enter, (3) that this was known to respondent, (4) that respondent knew that the alien's last entry was within three years, and (5) that respondent acted willfully in furtherance of the alien's violation of the law. *United States* v. *Gonzalez-Hernandez*, 534 F. 2d 1353, 1354 (CA9 1976). Since the third and fourth

Government, was entitled to decide whether or not the illegal-alien eyewitnesses in this case could give testimony material and relevant to the defense.

I dissent.

---

elements of this statutory requirement bear upon respondent's state of mind, it is plain that the illegal aliens whom respondent was transporting might very well have been able to testify to his lack of knowledge on these critical points.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 81-202. Argued March 3, 1982—Decided July 2, 1982

In 1966, a boycott of white merchants in Claiborne County, Miss., was launched at a meeting of a local branch of the National Association for the Advancement of Colored People (NAACP) attended by several hundred black persons. The purpose of the boycott was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was largely supported by speeches encouraging nonparticipants to join the common cause and by nonviolent picketing, but some acts and threats of violence did occur. In 1969, respondent white merchants filed suit in Mississippi Chancery Court for injunctive relief and damages against petitioners (the NAACP, the Mississippi Action for Progress, and a number of individuals who had participated in the boycott, including Charles Evers, the field secretary of the NAACP in Mississippi and a principal organizer of the boycott). Holding petitioners jointly and severally liable for all of respondents' lost earnings during a 7-year period from 1966 to the end of 1972 on three separate conspiracy theories, including the tort of malicious interference with respondents' businesses, the Chancery Court imposed damages liability and issued a permanent injunction. The Mississippi Supreme Court rejected two theories of liability but upheld the imposition of liability on the basis of the common-law tort theory. Based on evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses, the court held that the entire boycott was unlawful and affirmed petitioners' liability for all damages "resulting from the boycott" on the ground that petitioners had *agreed* to use force, violence, and "threats" to effectuate the boycott.

Held:

1. The nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment. Pp. 907-915.

(a) Through exercise of their First Amendment rights of speech, assembly, association, and petition, rather than through riot or revolution, petitioners sought to bring about political, social, and economic change. Pp. 907-912.

(b) While States have broad power to regulate economic activities, there is no comparable right to prohibit peaceful political activity such as that found in the boycott in this case. Pp. 912-915.

2. Petitioners are not liable in damages for the consequences of their nonviolent, protected activity. Pp. 915–920.

(a) While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity; only those losses proximately caused by the unlawful conduct may be recovered. Pp. 915–918.

(b) Similarly, the First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. Pp. 918–920.

3. The award for all damages "resulting from the boycott" cannot be sustained, where the record discloses that all of the respondents' business losses were not proximately caused by violence or threats of violence. Pp. 920–932.

(a) To the extent that the Mississippi Supreme Court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment. The court's ambiguous findings are inadequate to assure the "precision of regulation" demanded by that Amendment. Pp. 920–924.

(b) Regular attendance and participation at the meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability on the individual petitioners. Nor can liability be imposed on such individuals simply because they were either "store watchers" who stood outside the boycotted merchants' stores to record the names of black citizens who patronized the stores or members of a special group of boycott "enforcers." Pp. 924–926.

(c) For similar reasons, the judgment against Evers cannot be separately justified, nor can liability be imposed upon him on the basis of speeches that he made, because those speeches did not incite violence or specifically authorize the use of violence. His acts, being insufficient to impose liability on him, may not be used to impose liability on the NAACP, his principal. Moreover, there is no finding that Evers or any other NAACP member had either actual or apparent authority from the NAACP to commit acts of violence or to threaten violent conduct or that the NAACP ratified unlawful conduct. To impose liability on the NAACP without such a finding would impermissibly burden the rights of political association that are protected by the First Amendment. Pp. 926–932.

393 So. 2d 1290, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., concurred in the result. MARSHALL, J., took no part in the consideration or decision of the case.

Lloyd N. Cutler argued the cause for petitioners. With him on the briefs were *James Robertson, Edward Tynes Hand, William R. Richardson, Jr., John Payton, Thomas I. Atkins, Charles E. Carter, William L. Robinson,* and *Frank R. Parker.*

Grover Rees III argued the cause for respondents. With him on the briefs were *Crane D. Kipp, Christopher J. Walker,* and *Dixon L. Pyles.**

JUSTICE STEVENS delivered the opinion of the Court.

The term "concerted action" encompasses unlawful conspiracies and constitutionally protected assemblies. The "looseness and pliability" of legal doctrine applicable to concerted action led Justice Jackson to note that certain joint activities have a "chameleon-like" character.[1] The boycott of white merchants in Claiborne County, Miss., that gave rise to this litigation had such a character; it included elements of criminality and elements of majesty. Evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses convinced the Supreme Court of Mississippi that the entire boycott was unlawful and that each of the 92 petitioners was liable for all of its economic consequences. Evidence that persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens were the critical factors in the boycott's success presents us with the question whether the state court's judgment is consistent with the Constitution of the United States.

---

*Briefs of *amici curiae* urging reversal were filed by *John Vanderstar, Charles S. Sims,* and *Phyllis N. Segal* for the American Civil Liberties Union et al.; by *J. Albert Woll, Laurence Gold,* and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations; and by *Paul S. Berger, David Bonderman, Leonard B. Simon,* and *Nathan Z. Dershowitz* for the American Jewish Congress.

[1] See *Krulewitch* v. *United States*, 336 U. S. 440, 447–449 (concurring opinion).

I

In March 1966, black citizens of Port Gibson, Miss., and other areas of Claiborne County presented white elected officials with a list of particularized demands for racial equality and integration.[2] The complainants did not receive a satisfactory response and, at a local National Association for the Advancement of Colored People (NAACP) meeting at the First Baptist Church, several hundred black persons voted to place a boycott on white merchants in the area. On October 31, 1969, several of the merchants filed suit in state court to recover losses caused by the boycott and to enjoin future boycott activity. We recount first the course of that litigation and then consider in more detail the events that gave rise to the merchants' claim for damages.

A

The complaint was filed in the Chancery Court of Hinds County by 17 white merchants.[3] The merchants named two corporations and 146 individuals as defendants: the NAACP, a New York membership corporation; Mississippi Action for Progress (MAP), a Mississippi corporation that implemented the federal "Head Start" program; Aaron Henry, the President of the Mississippi State Conference of the NAACP; Charles Evers, the Field Secretary of the NAACP in Mississippi; and 144 other individuals who had participated in the boycott.[4] The complaint sought injunctive relief and an attachment of property, as well as damages. Although it alleged that the plaintiffs were suffering irreparable injury from an ongoing conspiracy, no preliminary relief was sought.

---

[2] Port Gibson is the county seat and largest municipality in Claiborne County.

[3] The affected businesses represented by the merchants included four grocery stores, two hardware stores, a pharmacy, two general variety stores, a laundry, a liquor store, two car dealers, two auto parts stores, and a gas station. Many of the owners of these boycotted stores were civic leaders in Port Gibson and Claiborne County. Respondents Allen and Al Batten were Aldermen in Port Gibson, Record 15111; Robert Vaughan, part owner and operator of one of the boycotted stores, represented Claiborne County in the Mississippi House of Representatives, *id.*, at 15160; respondents Abraham and Hay had served on the school board, *id.*, at 14906, 14678; respondent Hudson served on the Claiborne County Democratic Committee, *id.*, at 840.

Trial began before a chancellor in equity on June 11, 1973.[5] The court heard the testimony of 144 witnesses during an 8-month trial. In August 1976, the chancellor issued an opinion and decree finding that "an overwhelming preponderance of the evidence" established the joint and several liability of

---

[4] The complaint also named 52 banks as "attachment defendants." The banks answered that the NAACP had $16,800 on deposit in Mississippi.

[5] As a result of the plaintiffs' prayer for an attachment in equity, jurisdiction existed in Chancery Court. The trial judge ruled: "It was incumbent upon this court to hear the case in full once jurisdiction was assumed. To have heard the portions of this matter sounding in equity, only, and to have transferred the questions of tort liability and damages to the circuit court would have been contrary to the maxim 'equity delights to do complete justice, and not by halves.'" App. to Pet. for Cert. 56b. The defendants thus were denied a jury trial on the liability issues. Although the court recognized that it had power to empanel a jury, it declined to exercise its discretion to do so. *Ibid.* The Mississippi nonresident attachment statute that provided the basis for equitable jurisdiction has since been declared unconstitutional by both Federal District Courts in Mississippi. *MPI, Inc.* v. *McCullough*, 463 F. Supp. 887 (ND Miss. 1978); *Mississippi Chem. Corp.* v. *Chemical Constr. Corp.*, 444 F. Supp. 925 (SD Miss. 1977).

Commencement of trial was delayed by collateral proceedings in federal court. See *Henry* v. *First National Bank of Clarksdale*, 50 F. R. D. 251 (ND Miss. 1970), rev'd, 444 F. 2d 1300 (CA5 1971), cert. denied, 405 U. S. 1019. The District Court entered a preliminary injunction restraining the state proceedings on the theory that the merchants sought to infringe the defendants' First Amendment rights. The Court of Appeals reversed, holding that the mere commencement of a private tort suit did not itself involve "state action" for purposes of 28 U. S. C. § 1343(3).

130 of the defendants on three separate conspiracy theories.[6] First, the court held that the defendants were liable for the tort of malicious interference with the plaintiffs' businesses, which did not necessarily require the presence of a conspiracy.[7] Second, the chancellor found a violation of a state

---

[6] App. to Pet. for Cert. 2g. Of the original 148 named defendants, 16 were dismissed by stipulation of counsel (12 had died, 2 were minors, 1 was *non compos mentis*, and 1—the Reverend Dominic Cangemi—was dismissed by agreement without explanation). One defendant was dismissed because he had been misidentified in the complaint. The chancellor dismissed one defendant—state NAACP leader Aaron Henry—because "the complainants failed to meet the burden of proof as to [his] wrongdoing." *Id.*, at 28b. Thus, except for the defendants dismissed by stipulation or because of misidentification, the plaintiffs prevailed on the merits in the trial court against all but one of the defendants.

[7] Although the bulk of the court's discussion of the defendants' common-law tort liability focused on the presence of a civil conspiracy, the chancellor did not appear to hold that a concerted refusal to deal—without more—was actionable under the common law of Mississippi. The court apparently based its first theory of liability on the ground that the "malicious interference by the defendants with the businesses of the complainants as shown by the evidence in this case is tortious *per se*, and this would be true even without the element of conspiracy." *Id.*, at 42b (footnote omitted). In Mississippi, "[e]ither an individual or a corporation, whether acting in conjunction with others, or not," may be liable in an action for "malicious interference with a trade or calling." *Memphis Laundry-Cleaners* v. *Lindsey*, 192 Miss. 224, 239, 5 So. 2d 227, 232 (1941). The chancellor in this case stated that the necessary element of malice is established by proof of "the intentional performance of an act harmful to another without just or lawful cause or excuse." App. to Pet. for Cert. 42b, n. 8.

The repeated references to the presence of a conspiracy might be explained by the court's finding that each of the defendants—with the exception of Aaron Henry—was jointly and severally liable for the plaintiffs' losses. As noted, an element of the plaintiffs' common-law action was the defendants' intentional performance of an "unprivileged" act harmful to another. The chancellor stated that the evidence clearly established that "certain defendants" had committed "overt acts which were injurious to the trade and business of complainants." *Id.*, at 39b. The court continued: "Where two or more persons conspire together, the conspiracy makes the wrongful act of each person the joint acts of them all," *id.*, at 41b; "[i]t statutory prohibition against secondary boycotts, on the theory that the defendants' primary dispute was with the governing authorities of Port Gibson and Claiborne County and not with the white merchants at whom the boycott was directed.[8] Third, the court found a violation of Mississippi's antitrust statute, on the ground that the boycott had diverted black patronage from the white merchants to black merchants and to other merchants located out of Claiborne County and thus had unreasonably limited competition between black and white merchants that had traditionally existed.[9] The chancellor specifically rejected the defendants' claim that their conduct was protected by the First Amendment.[10]

---

follows that each act done in pursuance of the conspiracy by one of several conspirators is, in contemplation of the law, an act for which each is jointly and severally liable." *Ibid.* Thus, the presence of a conspiracy rendered all of the "conspirators" liable for the wrongful acts of any member of that conspiracy.

[8] See Miss. Code Ann. § 97-23-85 (1972). The chancellor found: "The testimony in the case at bar clearly shows that the principal objective of the boycott was to force the white merchants of Port Gibson and Claiborne County to bring pressure upon governing authorities to grant defendants' demands or, in the alternative, to suffer economic ruin." App. to Pet. for Cert. 51b. As noted, however, many of the merchants themselves were civic leaders. See n. 3, *supra*.

[9] See Miss. Code Ann. § 75-21-9 (1972). The court made clear that under this theory intentional participation in the concerted action rendered each defendant directly liable for all resulting damages. "As a legal principle, it is sufficient to show that the concert of action on the part of the defendants was deliberately invited, and that the defendants gave their adherence to the scheme and participated in it." App. to Pet. for Cert. 54b. The same was true of the court's secondary boycott theory; "since an illegal boycott is an invasion of a property right, the members of the boycotting combination are liable for the resulting damages." *Id.*, at 53b.

[10] In its discussion of the secondary boycott statute, the court rejected an argument that the statute was unconstitutional under the First and Fourteenth Amendments. Noting as a "basic premise" that "secondary boycotts are unlawful under both United States and Mississippi law," the court stated that "conduct and communication which are illegal are not protected

Five of the merchants offered no evidence of business losses. The chancellor found that the remaining 12 had suffered lost business earnings and lost goodwill during a 7-year period from 1966 to 1972 amounting to $944,699. That amount, plus statutory antitrust penalties of $6,000 and a $300,000 award of attorney's fees, produced a final judgment of $1,250,699, plus interest from the date of judgment and costs. As noted, the chancellor found all but 18 of the original 148 defendants jointly and severally liable for the entire judgment. The court justified imposing full liability on the national organization of the NAACP on the ground that it had failed to "repudiate" the actions of Charles Evers, its Field Secretary in Mississippi.

In addition to imposing damages liability, the chancellor entered a broad permanent injunction. He permanently enjoined petitioners from stationing "store watchers" at the respondents' business premises; from "persuading" any person to withhold his patronage from respondents; from "using demeaning and obscene language to or about any person" because that person continued to patronize the respondents; from "picketing or patroling" the premises of any of the respondents; and from using violence against any person or inflicting damage to any real or personal property.[11]

---

by the constitutional provisions relating to freedom of speech." *Id.*, at 46b. In imposing liability under the state restraint of trade statute, the chancellor added: "After a careful consideration of the constitutional claims of defendants, the Court finds that none of the acts or conduct of defendants was shielded or protected by the Constitution of the United States or the Constitution of the State of Mississippi." *Id.*, at 55b–56b. Finally, in assessing damages, the court stated: "Defendants base their defense on the concept that the right to boycott and inflict losses on complainants was a legally protected right afforded them under the laws and Constitution of the United States. This Court has hereinbefore found that the conduct of the defendants was unlawful and unprotected." *Id.*, at 62b.

[11] *Id.*, at 19g. Following the entry of judgment, the defendants moved for relief from Mississippi's 125-percent supersedeas bonding requirement. Although the Mississippi Supreme Court denied the motion, a federal court

In December 1980, the Mississippi Supreme Court reversed significant portions of the trial court's judgment. 393 So. 2d 1290. It held that the secondary boycott statute was inapplicable because it had not been enacted until "the boycott had been in operation for upward of two years."[12] The court declined to rely on the restraint of trade statute, noting that the "United States Supreme Court has seen fit to hold boycotts to achieve political ends are not a violation of the Sherman Act, 15 U. S. C. § 1 (1970), after which our statute is patterned."[13] Thus, the court rejected two theories of liability that were consistent with a totally voluntary and nonviolent withholding of patronage from the white merchants.

The Mississippi Supreme Court upheld the imposition of liability, however, on the basis of the chancellor's common-law tort theory. After reviewing the chancellor's recitation of the facts, the court quoted the following finding made by the trial court:

> "In carrying out the agreement and design, certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results. Most effective, also, was the stationing of guards ('enforcers,' 'deacons,' or 'black hats') in the vicinity of white-owned businesses. Unquestionably, the evidence shows that the volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse

---

enjoined execution of the Chancery Court judgment pending appeal. *Henry* v. *First National Bank of Clarksdale*, 424 F. Supp. 633 (ND Miss. 1976), aff'd, 595 F. 2d 291 (CA5 1979), cert. denied, 444 U. S. 1074.

[12] 393 So. 2d, at 1300.

[13] *Id.*, at 1301.

> from the complainants." App. to Pet. for Cert. 39b (quoted 393 So. 2d, at 1300).

On the basis of this finding, the court concluded that the entire boycott was unlawful. "If any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other."[14] In a brief passage, the court rejected petitioners' reliance on the First Amendment:

> "The agreed use of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy. We know of no instance, and our attention has been drawn to no decision, wherein it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime." *Id.*, at 1301.

The theory of the Mississippi Supreme Court, then, was that petitioners had *agreed* to use force, violence, and "threats" to effectuate the boycott.[15] To the trial court, such a finding had not been necessary.[16]

Although the Mississippi Supreme Court affirmed the chancellor's basic finding of liability, the court held that respondents "did not establish their case" with respect to 38 of the defendants.[17] The court found that MAP was a victim, rather than a willing participant, in the conspiracy and dismissed—without further explanation—37 individual defendants for lack of proof. Finally, the court ruled that certain damages had been improperly awarded and that other damages had been inadequately proved. The court remanded for further proceedings on the computation of damages.[18]

---

[14] *Ibid.*

[15] The court did not specifically identify the evidence linking any of the defendants to such an agreement.

[16] As noted, liability under the secondary boycott and restraint of trade statutes could be found on the basis of an entirely voluntary and nonviolent agreement to withhold patronage. See n. 9, *supra*. It is not clear whether—in its imposition of tort liability—the trial court rested on a theory similar to that ultimately advanced by the Mississippi Supreme Court. In finding an unlawful civil conspiracy—which rendered each conspirator liable for the actions of others, see n. 7, *supra*—the chancellor arguably believed that it was necessary to connect all defendants to an agreement to use force or violence to effectuate the conspiracy. See App. to Pet. for Cert. 40b–41b. The chancellor made no factual finding, however, that such an agreement existed.

We granted a petition for certiorari. 454 U. S. 1030. At oral argument, a question arose concerning the factual basis for the judgment of the Mississippi Supreme Court. As noted, that court affirmed petitioners' liability for damages on the ground that each of the petitioners had agreed to effectuate the boycott through force, violence, and threats. Such a finding was not necessary to the trial court's imposition of liability and neither state court had identified the evidence actually linking the petitioners to such an agreement. In response to a request from this Court, respondents filed a supplemental brief "specifying the acts committed by each of the petitioners giving rise to liability for damages." Supplemental Brief for Respondents 1. That brief helpfully places the petitioners in different categories; we accept respondents' framework for analysis and identify these classes as a preface to our review of the relevant incidents that occurred during the 7-year period for which damages were assessed.[19]

---

[17] 393 So. 2d, at 1302.

[18] Concerning the permanent injunction entered by the chancellor, the court stated: "Although the granting of injunction has been assigned as error, the error has not been argued, and NAACP, et al. say, at the conclusion of their brief '. . . the injunctive aspects of the case are now moot. . . .'" *Id.*, at 1293. Despite this finding, the court did not vacate the injunction.

[19] Respondents acknowledge that "[t]he basis on which the Mississippi Supreme Court held that petitioners were liable for damages was 'the agreed use of illegal force, violence and threats.'" Supplemental Brief for Respondents 1–2.

First, respondents contend that liability is justified by evidence of participation in the "management" of the boycott.[20] Respondents identify two groups of persons who may be found liable as "managers": 79 individuals who regularly attended Tuesday night meetings of the NAACP at the First Baptist Church; and 11 persons who took "leadership roles" at those meetings.[21]

Second, respondents contend that liability is justified by evidence that an individual acted as a boycott "enforcer."[22] In this category, respondents identify 22 persons as members of the "Black Hats"—a special group organized during the boycott—and 19 individuals who were simply "store watchers."

Third, respondents argue that those petitioners "who themselves engaged in violent acts or who threatened violence have provided the best possible evidence that they wanted the boycott to succeed by coercion whenever it could not succeed by persuasion." *Id.*, at 10. They identify 16 individuals for whom there is direct evidence of participation in what respondents characterize as violent acts or threats of violence.

---

[20] Respondents argue that anyone "who participates in the decisionmaking functions of an enterprise, with full knowledge of the tactics by which the enterprise is being conducted, manifests his assent to those tactics . . . ." *Id.*, at 2. Respondents thus would impose liability for the managers' *failure* to act; respondents argue that, despite evidence that boycott "enforcers" caused fear of injury to persons and property, "they were not taken from their posts and replaced by a system of voluntary compliance; there is no evidence that any of the petitioners even admonished them for their enforcement methods; the successful system of paramilitary enforcers on the streets and 'rhetorical' threats of violence by boycott leaders was left in place for the duration." *Id.*, at 5.

[21] These groups are not meant to be exclusive.

[22] "Once the pattern had been established—warnings to prospective customers, destruction of goods purchased at boycotted stores, public displays of weapons and of military discipline, denunciation of names gathered by the store-watchers, and subsequent violence against the persons and property of boycott breakers—store-watching in Port Gibson became the sort of activity from which a court could reasonably infer an intention to frighten people away from the stores." *Id.*, at 8.

Fourth, respondents contend that Charles Evers may be held liable because he "threatened violence on a number of occasions against boycott breakers." *Id.*, at 13. Like the chancellor, respondents would impose liability on the national NAACP because Evers "was acting in his capacity as Field Secretary of the NAACP when he committed these tortious and constitutionally unprotected acts." *Ibid.*

Finally, respondents state that they are "unable to determine on what record evidence the state courts relied in finding liability on the part of seven of the petitioners." *Id.*, at 16. With these allegations of wrongdoing in mind, we turn to consider the factual events that gave rise to this controversy.

B

The chancellor held petitioners liable for all of respondents' lost earnings during a 7-year period from 1966 to December 31, 1972. We first review chronologically the principal events that occurred during that period, describe some features of the boycott that are not in dispute, and then identify the most significant evidence of violent activity.

In late 1965 or early 1966, Charles Evers, the Field Secretary of the NAACP, helped organize the Claiborne County Branch of the NAACP. The pastor of the First Baptist Church, James Dorsey, was elected president of the Branch; regular meetings were conducted each Tuesday evening at the church. At about the same time, a group of black citizens formed a Human Relations Committee and presented a petition for redress of grievances to civic and business leaders of the white community. In response, a biracial committee—including five of the petitioners and several of the respondents—was organized and held a series of unproductive meetings.

The black members of the committee then prepared a further petition entitled "Demands for Racial Justice." This petition was presented for approval at the local NAACP meeting conducted on the first Tuesday evening in March. As described by the chancellor, "the approximately 500 people present voted their approval unanimously."[23] On March 14, 1966, the petition was presented to public officials of Port Gibson and Claiborne County.

The petition included 19 specific demands. It called for the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers. It stated that "Negroes are not to be addressed by terms as 'boy,' 'girl,' 'shine,' 'uncle,' or any other offensive term, but as 'Mr.,' 'Mrs.,' or 'Miss,' as is the case with other citizens."[24] As described by the chancellor, the purpose of the demands "was to gain equal rights and opportunities for Negro citizens."[25] The petition further provided that black leaders hoped it would not be necessary to resort to the "selective buying campaigns" that had been used in other communities.[26] On March 23, two demands that had been omitted

---

[23] App. to Pet. for Cert. 15b.

[24] *Id.*, at 10b.

[25] *Id.*, at 12b.

[26] The petition stated:

"We hope it will not be necessary to resort to the kind of peaceful demonstrations and selective buying campaigns which have had to be used in other communities. It takes manpower, time and energy which could be better directed at solving these problems which exist in Port Gibson and Claiborne County by mutual cooperation and efforts at tolerant understanding.

"No one likes to have to resort to picketing and other kinds of demonstration—just as no one likes to be the target of this kind of demonstration. But this sort of thing is inevitable unless there can be real progress toward giving all citizens their equal rights. There seems sometimes to be no other alternative.

"Objectives of Negro citizens of Port Gibson and Claiborne County are, simply put, to have equality of opportunity, in every aspect of life, and to end the white supremacy which has pervaded community life. This imfrom the original petition were added, one of which provided: "All stores must employ Negro clerks and cashiers."[27] This supplemental petition stated that a response was expected by April 1.

A favorable response was not received. On April 1, 1966, the Claiborne County NAACP conducted another meeting at the First Baptist Church. As described by the chancellor:

> "Several hundred black people attended the meeting, and the purpose was to decide what action should be taken relative to the twenty-one demands. Speeches were made by Evers and others, and a vote was taken. It was the unanimous vote of those present, without dissent, to place a boycott on the white merchants of Port Gibson and Claiborne County." App. to Pet. for Cert. 15b.

The boycott was underway.[28]

In September 1966, Mississippi Action for Progress, Inc. (MAP), was organized to develop community action programs in 20 counties of Mississippi. One of MAP's programs—known as Head Start—involved the use of federal funds to provide food for young children. Originally, food purchases in Claiborne County were made alternately from white-owned and black-owned stores, but in February 1967 the di-

---

plies many long-range objectives such as participation in decision-making at every level of community, civic, business and political affairs." *Id.*, at 9b.

[27] *Id.*, at 13b.

[28] Although Evers' speech on April 1, 1966, was not recorded, the chancellor found: "Evers told his audience that they would be watched and that blacks who traded with white merchants would be *answerable to him.* According to Sheriff Dan McKay, who was present during the speech, Evers told the assembled black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people. Evers' remarks were directed to all 8,000-plus black residents of Claiborne County, and not merely the relatively few members of the Claiborne NAACP." *Id.*, at 17b–18b (footnote omitted).

rectors of MAP authorized their Claiborne County representatives to purchase food only from black-owned stores. Since MAP bought substantial quantities of food, the consequences of this decision were significant. A large portion of the trial was devoted to the question whether MAP participated in the boycott voluntarily and—under the chancellor's theories of liability—could be held liable for the resulting damages. The chancellor found MAP a willing participant, noting that "during the course of the trial, the only Head Start cooks called to the witness stand testified that they refused to go into white-owned stores to purchase groceries for the children in the program *for the reason that they were in favor of the boycott and wanted to honor it.*"[29]

Several events occurred during the boycott that had a strong effect on boycott activity. On February 1, 1967, Port Gibson employed its first black policeman. During that month, the boycott was lifted on a number of merchants. On April 4, 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis. The chancellor found that this tragic event had a depressing effect on the black community and, as a result, the boycott "tightened."[30]

---

[29] *Id.*, at 22b (emphasis in original). The chancellor also noted that MAP's Board of Directors "did not seek help from local law-enforcement officers, nor did they complain to United States authorities for protection of their cooks from possible reprisals arising from trade with the white merchants"; and that "MAP employees in Claiborne County continued to take an active part in the NAACP activities and to support the boycott by picketing and marching." *Id.*, at 23b. The Mississippi Supreme Court rejected the chancellor's findings and concluded that MAP was not a willing participant in the boycott, thus absolving it from liability.

[30] *Id.*, at 25b. One of the respondents awarded the most in damages, Barbara Ellis—a partner in Ellis Variety Store—testified that the store was boycotted from April 1, 1966, until January 27, 1967. On the latter date, the store agreed—apparently at the urging of a biracial committee—to hire a black cashier. Record 1183. The boycott was reimposed on April 17, 1968, after the death of Martin Luther King, Jr., but again was lifted on May 1, 1968. *Id.*, at 1184. The boycott finally was reimposed on April 19, 1969, the day following the shooting of Roosevelt Jackson. *Ibid.*

One event that occurred during the boycott is of particular significance. On April 18, 1969, a young black man named Roosevelt Jackson was shot and killed during an encounter with two Port Gibson police officers.[31] Large crowds immediately gathered, first at the hospital and later at the church. Tension in the community neared a breaking point. The local police requested reinforcements from the State Highway Patrol and sporadic acts of violence ensued. The Mayor and Board of Aldermen placed a dawn-to-dusk curfew into effect.

On April 19, Charles Evers spoke to a group assembled at the First Baptist Church and led a march to the courthouse where he demanded the discharge of the entire Port Gibson Police Force. When this demand was refused, the boycott was reimposed on all white merchants. One of Evers' speeches on this date was recorded by the police. In that speech—significant portions of which are reproduced in an Appendix to this opinion—Evers stated that boycott violators would be "disciplined" by their own people and warned that the Sheriff could not sleep with boycott violators at night.

On April 20, Aaron Henry came to Port Gibson, spoke to a large gathering, urged moderation, and joined local leaders in a protest march and a telegram sent to the Attorney General of the United States. On April 21, Evers gave another speech to several hundred people, in which he again called for a discharge of the police force and for a total boycott of all white-owned businesses in Claiborne County. Although this speech was not recorded, the chancellor found that Evers stated: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[32]

As noted, this lawsuit was filed in October 1969. No significant events concerning the boycott occurred after that time. The chancellor identified no incident of violence that occurred after the suit was brought. He did identify, however, several significant incidents of boycott-related violence that occurred some years earlier.

---

[31] The officers had gone to Jackson's home to arrest him. A scuffle ensued and Jackson was shot by a white officer allegedly while being held by a black officer.

[32] App. to Pet. for Cert. 27b.

Before describing that evidence, it is appropriate to note that certain practices generally used to encourage support for the boycott were uniformly peaceful and orderly. The few marches associated with the boycott were carefully controlled by black leaders. Pickets used to advertise the boycott were often small children. The police made no arrests—and no complaints are recorded—in connection with the picketing and occasional demonstrations supporting the boycott. Such activity was fairly irregular, occurred primarily on weekends, and apparently was largely discontinued around the time the lawsuit was filed.[33]

One form of "discipline" of black persons who violated the boycott appears to have been employed with some regularity. Individuals stood outside of boycotted stores and identified those who traded with the merchants. Some of these "store watchers" were members of a group known as the "Black Hats" or the "Deacons."[34] The names of persons who violated the boycott were read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the "Black Times." As stated by the chancellor, those persons "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites."[35]

---

[33] Record 1146. The Sheriff of Claiborne County testified: "There were pickets off and on from April, 1966 to 1970." *Id.*, at 1060. When asked to describe "how they conducted themselves, what they did, what they went about doing," he stated: "Most of them carried or either had signs on their shoulders and they walked up and down the streets in front of the stores. They wouldn't always picket the same stores at the same time. At different times they might picket M&M then they would move up and picket Claiborne Hardware down Market Street to other businesses. Most of the time it was teenagers and at the last it was little bitty fellows, as young as about six years old. That was '69 and '70." *Ibid.* The Sheriff also testified that the boycott was "tight" in April 1966, April 1968, and April 1969. *Id.*, at 1152.

[34] Evidence concerning the aims and practices of the "Black Hats" is contradictory. Respondents describe them as a "paramilitary organization." Petitioner Elmo Scott, a member of the group, testified concerning instructions that were given to him: "It was given to the Deacons to give respect to the people that was on the street and, regardless of what they say back to you, for you not to use bad language to them or not to curse

The chancellor also concluded that a quite different form of discipline had been used against certain violators of the boycott. He specifically identified 10 incidents that "strikingly" revealed the "atmosphere of fear that prevailed among blacks from 1966 until 1970."[36] The testimony concerning four incidents convincingly demonstrates that they occurred because the victims were ignoring the boycott. In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; in the fourth, a flower garden was damaged. None of these four victims, however, ceased trading with white merchants.[37]

---

them or no kind of way, just talk to them in the right manner of way." *Id.*, at 2985. It is undisputed that the "Black Hats" were formed during the boycott, that members of the organization engaged in "store watching" and other "enforcement" activities, and that some individuals who belonged to the group committed acts of violence.

[35] App. to Pet. for Cert. 19b.

[36] *Id.*, at 35b.

[37] On August 22, 1966, birdshot was fired into the home of James Gilmore, a black man who ignored the boycott. He immediately grabbed a shotgun, leapt into his car, pursued the vehicle from which he believed the shots had come, forced it to the side of the road, and apprehended three young black men who were active supporters of the boycott. They were indicted, tried, and convicted, but the convictions were set aside on appeal. *Whitney* v. *State*, 205 So. 2d 284 (Miss. 1967). Gilmore continued to patronize white merchants after the incident.

In June 1966, while Murriel Cullens was having a beer in Wolf's Store, a brick was thrown through the windshield of his parked car. He had been patronizing white merchants and continued to do so thereafter. Record 14049. In November 1966, shotgun pellets were fired into the wall of his mother's home. She had received a number of threatening telephone calls criticizing her for patronizing white stores. She continued to do so after the incident. *Id.*, at 14003. At trial, Laura Cullens testified, in response

The evidence concerning four other incidents is less clear, but again it indicates that an unlawful form of discipline was applied to certain boycott violators. In April 1966, a black couple named Cox asked for a police escort to go into a white-owned dry cleaner and, a week later, shots were fired into their home. In another incident, an NAACP member took a bottle of whiskey from a black man who had purchased it in a white-owned store. The third incident involved a fight between a commercial fisherman who did not observe the boycott and four men who "grabbed me and beat me up and took a gun off me."[38] In a fourth incident, described only in hearsay testimony, a group of young blacks apparently pulled down the overalls of an elderly brick mason known as "Preacher White" and spanked him for not observing the boycott.[39]

Two other incidents discussed by the chancellor are of less certain significance. Jasper Coleman testified that he par-

---

to a question whether she had been scared: "No indeed. I haven't had a bone in me scared in my life from nobody. And I have always told them, they say, 'You're just an uncle tom.' And I say, 'Well, uncle tom can be blue, black, green or purple or white. If I feel I am in the right, I stand in that right and nobody tells me what to do.'" *Id.*, at 14017.

James Bailey, who was a teenager at the time of the incident, testified that he had noticed that an elderly black lady named Willie Butler traded with a white merchant and had groceries delivered to her home. He testified that he destroyed flowers in her garden to punish her for violating the boycott. *Id.*, at 3656. He stated that he acted on his own initiative and that Mrs. Butler continued to trade with the merchant. *Id.*, at 3660, 3741.

[38] *Id.*, at 13868. One of his assailants testified that the incident resulted from an automobile accident, rather than the boycott. *Id.*, at 3656.

[39] "Preacher White" had died by the time of trial. No witness admitted being present at what respondents' counsel characterized as "the spanking of Preacher White." *Id.*, at 3696. The Port Gibson Chief of Police testified, however, that White had come in and complained that a group of young blacks had pulled his overalls down and whipped him. *Id.*, at 2176. In describing this incident, the chancellor stated that Preacher White "was stripped of his clothing and whipped by a group of young blacks because he refused to honor the boycott." App. to Pet. for Cert. 37b.

ticipated in an all-night poker game at a friend's house on Christmas Eve 1966. The following morning he discovered that all four tires of his pickup truck had been slashed with a knife. Coleman testified that he did not participate in the boycott but was never threatened for refusing to do so. Record 13791. Finally, Willie Myles testified that he and his wife received a threatening phone call and that a boy on a barge told him that he would be whipped for buying his gas at the wrong place.

Five of these incidents occurred in 1966. The other five are not dated. The chancellor thus did not find that any act of violence occurred after 1966.[40] In particular, he made no reference to any act of violence or threat of violence—with the exception, of course, of Charles Evers' speeches—after the shootings of Martin Luther King, Jr., in 1968 or Roosevelt Jackson in 1969. The chancellor did not find that any of the incidents of violence was discussed at the Tuesday evening meetings of the NAACP.[41]

II

This Court's jurisdiction to review the judgment of the Mississippi Supreme Court is, of course, limited to the federal questions necessarily decided by that court.[42] We consider first whether petitioners' activities are protected in any respect by the Federal Constitution and, if they are, what effect such protection has on a lawsuit of this nature.

---

[40] In describing the "atmosphere of fear" existing during the boycott, the chancellor emphasized the participation of petitioner Rudy Shields. He stated:

> "Defendant Rudolph J. (Rudy) Shields, formerly of Chicago, was the principal figure in several altercations. He boasted that he was 'the most jailed person in the Claiborne County boycott.' This man was the acknowledged leader of the 'Deacons.'" *Id.*, at 35b.

See also Supplemental Brief for Respondents 10–13. The record indicates that Shields was in Port Gibson for approximately eight months during 1966. Record 4993.

[41] The chancellor did find—and apparently believed this fact to be significant—that the NAACP provided attorneys to black persons arrested in connection with acts arising from the boycott. App. to Pet. for Cert. 38b. The NAACP provided legal representation to the three black persons arrested in August 1966 following the Gilmore shooting.

A

The boycott of white merchants at issue in this case took many forms. The boycott was launched at a meeting of a local branch of the NAACP attended by several hundred persons. Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause.

Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.[43] The black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect. As we so recently acknowledged in *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 294, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Ibid.* In emphasizing "the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues," *id.*, at 295, we noted the words of Justice Harlan, writing for the Court in *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460:

---

[42] Although the Mississippi Supreme Court remanded for a recomputation of damages, its judgment is final for purposes of our jurisdiction. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 480.

[43] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amdt. 1. First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. *Edwards* v. *South Carolina*, 372 U. S. 229, 235.

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."

THE CHIEF JUSTICE stated for the Court in *Citizens Against Rent Control:* "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." 454 U. S., at 296.

The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected. In *De Jonge* v. *Oregon*, 299 U. S. 353, the Court unanimously held that an individual could not be penalized simply for assisting in the conduct of an otherwise lawful meeting held under the auspices of the Communist Party, an organization that advocated "criminal syndicalism." After reviewing the rights of citizens "to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances," *id.*, at 364, Chief Justice Hughes, writing for the Court, stated:

> "It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices

> under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *Id.*, at 365.

Of course, the petitioners in this case did more than assemble peaceably and discuss among themselves their grievances against governmental and business policy. Other elements of the boycott, however, also involved activities ordinarily safeguarded by the First Amendment. In *Thornhill* v. *Alabama*, 310 U. S. 88, the Court held that peaceful picketing was entitled to constitutional protection, even though, in that case, the purpose of the picketing "was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." *Id.*, at 99. Cf. *Chauffeurs* v. *Newell*, 356 U. S. 341. In *Edwards* v. *South Carolina*, 372 U. S. 229, we held that a peaceful march and demonstration was protected by the rights of free speech, free assembly, and freedom to petition for a redress of grievances.

Speech itself also was used to further the aims of the boycott. Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form. In addition, names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action. As Justice Rutledge, in describing the protection afforded by the First Amendment, explained:

> "It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins*, 323 U. S. 516, 537.

In *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, the Court considered the validity of a prior restraint on speech that invaded the "privacy" of the respondent. Petitioner, a racially integrated community organization, charged that respondent, a real estate broker, had engaged in tactics known as "blockbusting" or "panic peddling."[44] Petitioner asked respondent to sign an agreement that he would not solicit property in their community. When he refused, petitioner distributed leaflets near respondent's home that were critical of his business practices.[45] A state court enjoined petitioner from distributing the leaflets; an appellate court affirmed on the ground that the alleged activities were coercive and intimidating, rather than informative, and therefore not entitled to First Amendment protection. *Id.*, at 418. This Court reversed. THE CHIEF JUSTICE explained:

> "This Court has often recognized that the activity of peaceful pamphleteering is a form of communication pro-

---

[44] Specifically, petitioner contended that respondent "aroused the fears of the local white residents that Negroes were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings and sell homes to Negroes." 402 U. S., at 416.

[45] One of petitioner's officers testified at trial that he had hoped that respondent would be induced to sign the no-solicitation agreement by letting "his neighbors know what he was doing to us." *Id.*, at 417.

> tected by the First Amendment. *E. g., Martin* v. *City of Struthers*, 319 U. S. 141 (1943); *Schneider* v. *State*, 308 U. S. 147 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938). In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider* v. *State, supra; Thornhill* v. *Alabama*, 310 U. S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability." *Id.*, at 419.

In dissolving the prior restraint, the Court recognized that "offensive" and "coercive" speech was nevertheless protected by the First Amendment.[46]

In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable." *Thomas* v. *Collins, supra*, at 530. Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change.

---

[46] See *Watts* v. *United States*, 394 U. S. 705, 708 ("The language of the political arena, like the language used in labor disputes, see *Linn* v. *United Plant Guard Workers of America*, 383 U. S. 53, 58 (1966), is often vituperative, abusive, and inexact"). See also *Cohen* v. *California*, 403 U. S. 15; Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372 (1979).

Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.

The presence of protected activity, however, does not end the relevant constitutional inquiry. Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. See *United States* v. *O'Brien*, 391 U. S. 367.[47] A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *NLRB* v. *Retail Store Employees*, 447 U. S. 607. The right of business entities to "associate" to suppress competition may be curtailed. *National Society of Professional Engineers* v. *United States*, 435 U. S. 679. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *NLRB* v. *Retail Store Employees*, *supra*, at 617–618 (BLACKMUN, J., concurring in part). See *Longshoremen* v. *Allied International, Inc.*, 456 U. S. 212, 222–223, and n. 20.

---

[47] "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U. S., at 376–377 (footnotes omitted).

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey* v. *Brown*, 447 U. S. 455, 467. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75. There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, the Court considered whether the Sherman Act prohibited a publicity campaign waged by railroads against the trucking industry that was designed to foster the adoption of laws destructive of the trucking business, to create an atmosphere of distaste for truckers among the general public, and to impair the relationships existing between truckers and their customers. Noting that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms," the Court held that the Sherman Act did not proscribe the publicity campaign. *Id.*, at 137–138. The Court stated that it could not see how an intent to influence legislation to destroy the truckers as competitors "could transform conduct otherwise lawful into a violation of the Sherman Act." *Id.*, at 138–139. Noting that the right of the people to petition their representatives in government "cannot properly be made to depend on their intent in doing so," the Court held that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." *Id.*, at 139–140. This conclusion was not changed by the fact that the railroads' anticompetitive *purpose* produced an anticompetitive *effect;* the Court rejected the truckers' Sherman Act claim despite the fact that "the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action." *Id.*, at 143.

It is not disputed that a major purpose of the boycott in this case was to influence governmental action. Like the railroads in *Noerr*, the petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.[48]

In upholding an injunction against the state supersedeas bonding requirement in this case, Judge Ainsworth of the Court of Appeals for the Fifth Circuit cogently stated:

> "At the heart of the Chancery Court's opinion lies the belief that the mere organization of the boycott and every activity undertaken in support thereof could be subject to judicial prohibition under state law. This

---

[48] In *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, the Court unanimously rejected Alabama's effort to oust the NAACP from that State. The State claimed, in part, that the NAACP was "'engaged in organizing, supporting and financing an illegal boycott'" of Montgomery's bus system. *Id.*, at 302. Writing for the Court, Justice Harlan described as "doubtful" the "assumption that an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might, without more, in some circumstances violate a valid state law." *Id.*, at 307. In *Missouri* v. *National Organization for Women, Inc.*, 620 F. 2d 1301, 1317 (CA8 1980), cert. denied, 449 U. S. 842, Judge Stephenson stated that "the right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of a boycott."

> view accords insufficient weight to the First Amendment's protection of political speech and association. There is no suggestion that the NAACP, MAP or the individual defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment." *Henry* v. *First National Bank of Clarksdale*, 595 F. 2d 291, 303 (1979) (footnote omitted).

We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment.[49]

B

The Mississippi Supreme Court did not sustain the chancellor's imposition of liability on a theory that state law prohibited a nonviolent, politically motivated boycott. The fact that such activity is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed.[50] In particular, we consider here the effect of our holding that much of petitioners' conduct was constitutionally protected on the ability of the State to impose liability for elements of the boycott that were not so protected.[51]

---

[49] We need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law. See *Hughes* v. *Superior Court*, 339 U. S. 460.

[50] "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may

The First Amendment does not protect violence. "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" *Samuels* v. *Mackell*, 401 U. S. 66, 75 (Douglas, J., concurring). Although the extent and significance of the violence in this case are vigorously disputed by the parties, there is no question that acts of violence occurred. No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. *NAACP* v. *Button*, 371 U. S. 415, 438.[52] Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to

---

legitimately be regulated.' *Speiser* v. *Randall*, 357 U. S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp* v. *Florida*, 328 U. S. 331, 335; see also *One, Inc.* v. *Olesen*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372. We must 'make an independent examination of the whole record,' *Edwards* v. *South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285.

[51] Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment. *New York Times Co.* v. *Sullivan*, *supra*, at 265.

[52] See also *Carroll* v. *Princess Anne*, 393 U. S. 175, 184; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 604.

damages liability and on the persons who may be held accountable for those damages.

In *Mine Workers* v. *Gibbs*, 383 U. S. 715, the Court considered a case in many respects similar to the one before us. The case grew out of the rivalry between the United Mine Workers (UMW) and the Southern Labor Union (SLU) over representation of workers in the southern Appalachian coal fields. A coal company laid off 100 miners of UMW's Local 5881 when it closed one of its mines. That same year, a subsidiary of the coal company hired Gibbs as mine superintendent to attempt to open a new mine on nearby property through use of members of the SLU. Gibbs also received a contract to haul the mine's coal to the nearest railroad loading point. When he attempted to open the mine, however, he was met by armed members of Local 5881 who threatened Gibbs and beat an SLU organizer. These incidents occurred on August 15 and 16. Thereafter, there was no further violence at the mine site and UMW members maintained a peaceful picket line for nine months. No attempts to open the mine were made during that period.

Gibbs lost his job as superintendent and never began performance of the haulage contract. Claiming to have suffered losses as a result of the union's concerted plan against him, Gibbs filed suit in federal court against the international UMW. He alleged an unlawful secondary boycott under the federal labor laws and, as a pendent state-law claim, "an unlawful conspiracy and an unlawful boycott aimed at him . . . to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage." *Id.*, at 720. The federal claim was dismissed on the ground that the dispute was "primary" and therefore not cognizable under the federal prohibition of secondary labor boycotts. Damages were awarded against the UMW, however, on the state claim of interference with an employment relationship.

This Court reversed. The Court found that the pleadings, arguments of counsel, and jury instructions had not adequately defined the compass within which damages could be awarded under state law. The Court noted that it had "consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes" and had sustained "a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation." *Id.*, at 729. To accommodate federal labor policy, however, the Court in *Gibbs* held: "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct, and does not include consequences resulting from associated peaceful picketing or other union activity." *Ibid.* The Court noted that in *Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, damages were restricted to those directly and proximately caused by wrongful conduct chargeable to the defendants. "'Thus there [was] nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.'" 383 U. S., at 730 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 249, n. 6).

The careful limitation on damages liability imposed in *Gibbs* resulted from the need to accommodate state law with federal labor policy. That limitation is no less applicable, however, to the important First Amendment interests at issue in this case. Petitioners withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure. While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.

The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another. In *Scales* v. *United States,* 367 U. S. 203, 229, the Court noted that a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired." The Court suggested that to punish association with such a group, there must be "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'" *Ibid.* (quoting *Noto* v. *United States,* 367 U. S. 290, 299).[53] Moreover, in *Noto* v. *United States* the Court emphasized that this intent must be judged "according to the strictest law,"[54] for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Id.,* at 299–300.

In *Healy* v. *James,* 408 U. S. 169, the Court applied these principles in a noncriminal context. In that case the Court held that a student group could not be denied recognition at a state-supported college merely because of its affiliation with a national organization associated with disruptive and violent campus activity. It noted that "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Id.,* at 185–186. The Court stated that "it has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." *Id.,* at 186 (quoting *United States* v. *Robel,* 389 U. S. 258, 265). "The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." 408 U. S., at 186 (footnote omitted).[55]

---

[53] See *United States* v. *Robel,* 389 U. S. 258; *Elfbrandt* v. *Russell,* 384 U. S. 11; *Aptheker* v. *Secretary of State,* 378 U. S. 500.

[54] "*Strictissimi juris.*" 367 U. S., at 299.

The principles announced in *Scales*, *Noto*, and *Healy* are relevant to this case. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.[56] "In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960)." *Carroll* v. *Princess Anne*, 393 U. S. 175, 183–184.

III

The chancellor awarded respondents damages for all business losses that were sustained during a 7-year period beginning in 1966 and ending December 31, 1972.[57] With the ex-

---

[55] In *Rizzo* v. *Goode*, 423 U. S. 362, the Court vacated an injunction, directed against an entire police department, that had resulted from 20 specific incidents of police misconduct. The Court held that such collective responsibility should be limited to instances in which a concerted design existed to accomplish a wrongful objective. *Id.*, at 373–376.

[56] Of course, the question whether an individual may be held liable for damages merely by reason of his association with others who committed unlawful acts is quite different from the question whether an individual may be held liable for unlawful conduct that he himself authorized or incited. See *infra*, at 925–926.

[57] It is noteworthy that the portion of the chancellor's opinion discussing damages begins by referring expressly to the two theories of liability that the Mississippi Supreme Court rejected:

"The complainants proved, in this record, that they suffered injury to their respective businesses as the direct and proximate result of the unlawful secondary boycott and the defendants' actions in restraining trade, all of ception of Aaron Henry, all defendants were held jointly and severally liable for these losses. The chancellor's findings were consistent with his view that voluntary participation in the boycott was a sufficient basis on which to impose liability. The Mississippi Supreme Court properly rejected that theory; it nevertheless held that petitioners were liable for all damages "resulting from the boycott."[58] In light of the principles set forth above, it is evident that such a damages award may not be sustained in this case.

The opinion of the Mississippi Supreme Court itself demonstrates that all business losses were not proximately caused by the violence and threats of violence found to be present. The court stated that "coercion, intimidation, and threats" formed "*part* of the boycott activity" and "*contributed* to its almost complete success."[59] The court broadly asserted—without differentiation—that "'[i]ntimidation, threats, social ostracism, vilification, and traduction'" were devices used by the defendants to effectuate the boycott.[60] The court repeated the chancellor's finding that "the volition of *many* black persons was overcome out of sheer fear."[61] These findings are inconsistent with the court's imposition of all damages "resulting from the boycott." To the extent that the court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment. The ambiguous findings of the Mississippi Supreme Court are inadequate to assure the "precision of regulation" demanded by that constitutional provision.

---

which was accomplished by defendants through a conspiracy." App. to Pet. for Cert. 57b (footnote omitted).

In a footnote, the chancellor added that "any kind of boycott is unlawful if executed with force or violence or threats." *Id.*, at 57b, n. 21.

[58] 393 So. 2d, at 1307.

[59] *Id.*, at 1302 (emphasis added).

[60] *Id.*, at 1300 (quoting trial court; see App. to Pet. for Cert. 39b).

[61] 393 So. 2d, at 1300 (emphasis added).

The record in this case demonstrates that all of respondents' losses were not proximately caused by violence or threats of violence. As respondents themselves stated at page 12 of their brief in the Mississippi Supreme Court:

> "Most of the witnesses testified that they voluntarily went along with the NAACP and their fellow black citizens in honoring and observing the boycott because they wanted the boycott."

This assessment is amply supported by the record.[62] It is indeed inconceivable that a boycott launched by the unanimous vote of several hundred persons succeeded solely through fear and intimidation. Moreover, the fact that the boycott "intensified" following the shootings of Martin Luther King, Jr., and Roosevelt Jackson demonstrates that factors other than force and violence (by the petitioners) figured prominently in the boycott's success. The chancellor made no finding that any act of violence occurred after 1966. While the timing of the acts of violence was not important to the chancellor's imposition of liability, it is a critical factor under the narrower rationale of the Mississippi Supreme Court. That court has completely failed to demonstrate that business losses suffered in 1972—three years after this lawsuit was filed—were proximately caused by the isolated acts of violence found in 1966.[63] It is impossible to conclude that state power has not been exerted to compensate respondents for the direct consequences of nonviolent, constitutionally protected activity.

---

[62] The testimony of Julia Johnson—although itself only a small portion of a massive record—perhaps best illustrates this point:

"Q. How did you observe the boycott?

"A. I just stayed out of the stores, because I had my own personal reasons to stay out of the stores. There were some things I really wanted, and the things I wanted were the right to vote, the right to have a title—Mrs. or Mr. or whatever I am, and not uncle or aunt, boy or girl. So that's what I wanted. And if I wanted a job—a qualified job, I wanted to have the opportunity to be hired. Not hired because I'm black or white, but just hired.

"Q. And this was your reason for observing the boycott?

"A. Yes, it was.

"Q. And you were in favor of the boycott?

"A. Yes, I was in favor of the boycott.

"Q. And it wasn't because somebody threatened you?

"A. No, it wasn't because nobody threatened me.

"Q. You weren't afraid?

"A. Was I afraid?

"Q. Yes.

"A. No, I was not afraid." Record 15476.

It is clear that losses were sustained because persons like Julia Johnson "wanted justice and equal opportunity." *Id.*, at 6864 (testimony of Margaret Liggins). See *id.*, at 6737, 12419, 13543–13544.

This case is not like *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, in which the Court held that the presence of violence justified an injunction against both violent and nonviolent activity.[64] The violent conduct present in that case was pervasive.[65] The Court in *Meadowmoor* stated that "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force." *Id.*, at 293. The Court emphasized, however:

---

[63] It is also noteworthy that virtually every victim of the acts of violence found by the chancellor testified that he or she continued to patronize the white merchants. See *supra*, at 904, and n. 37.

[64] In *Mine Workers* v. *Gibbs*, 383 U. S. 715, the Court stated that if "special facts" such as those presented in *Meadowmoor* "appeared in an action for damages after picketing marred by violence had occurred," they might "support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered." 383 U. S., at 731–732.

[65] As described by the Court: "Witnesses testified to more than fifty instances of windowsmashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the ven-

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force." *Ibid.*

Such "insubstantial findings" were not present in *Meadowmoor.* But in this case, the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of *all* business losses sustained over a 7-year span. No losses are attributed to the voluntary participation of individuals determined to secure "justice and equal opportunity."[66] The court's judgment "screens reality" and cannot stand.[67]

Respondents' supplemental brief also demonstrates that on the present record no judgment may be sustained against most of the petitioners. Regular attendance and participation at the Tuesday meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability. The chancellor's findings do not suggest that any illegal conduct was authorized, ratified, or even discussed at any of the meetings. The Sheriff testified that he was kept

---

dor system were held with guns and severely beaten about the head while being told 'to join the union'; carloads of men followed vendors' trucks, threatening the drivers, and in one instance shot at the truck and driver." 312 U. S., at 291–292.

[66] See n. 62, *supra.*

[67] For the same reasons, the permanent injunction entered by the chancellor must be dissolved. Since the boycott apparently has ended, the Mississippi Supreme Court may wish to vacate the entire injunction on the ground that it is no longer necessary; alternatively, the injunction must be modified to restrain only unlawful conduct and the persons responsible for conduct of that character.

informed of what transpired at the meetings; he made no reference to any discussion of unlawful activity.[68] To impose liability for presence at weekly meetings of the NAACP would—ironically—not even constitute "guilt by association," since there is no evidence that the association possessed unlawful aims. Rather, liability could only be imposed on a "guilt *for* association" theory. Neither is permissible under the First Amendment.[69]

Respondents also argue that liability may be imposed on individuals who were either "store watchers" or members of the "Black Hats." There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others. As established above, mere association with either group—absent a specific intent to further an unlawful aim embraced by that group—is an insufficient predicate for liability. At the same time, the evidence does support the conclusion that some members of each of these groups engaged in violence or threats of violence. Unquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained.

---

[68] See Record 1172. The strongest evidence of wrongdoing at the meetings was presented by petitioner Marjorie Brandon, who served at times as the local NAACP secretary. She testified that "in the meetings there were statements saying that you would be dealt with" if found trading in boycotted stores. *Id.*, at 5637. She stated that she understood "dealt with" to mean "they would take care of you, do something to you, if you were caught going in." *Ibid.* Her testimony does not disclose who made the statements, how often they were made, or that they were in any way endorsed by others at the meetings. A massive damages judgment may not be sustained on the basis of this testimony; the fact that certain anonymous persons made such statements at some point during a 7-year period is insufficient to establish that the Association itself possessed unlawful aims or that any petitioner specifically intended to further an unlawful goal.

[69] A legal duty to "repudiate"—to disassociate oneself from the acts of another—cannot arise unless, absent the repudiation, an individual could be found liable for those acts. As our decisions in *Scales*, *Noto*, and *Healy* make clear, see *supra*, at 920, civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. The chancellor in this case made no finding that the individuals who committed those acts of violence were "agents" or "servants" of those who attended the NAACP meetings; certainly such a relationship cannot be found simply because both shared certain goals. Cf. *General Building Contractors Assn.* v. *Pennsylvania*, *ante*, at 391–395.

Respondents have sought separately to justify the judgment entered against Charles Evers and the national NAACP. As set forth by the chancellor, Evers was specially connected with the boycott in four respects. First, Evers signed the March 23 supplemental demand letter and unquestionably played the primary leadership role in the organization of the boycott. Second, Evers participated in negotiations with MAP and successfully convinced MAP to abandon its practice of purchasing food alternately from white-owned and black-owned stores. Third, he apparently presided at the April 1, 1966, meeting at which the vote to begin the boycott was taken; he delivered a speech to the large audience that was gathered on that occasion. See n. 28, *supra*. Fourth, Evers delivered the speeches on April 19 and 21, 1969, which we have discussed previously. See *supra*, at 902; Appendix to this opinion.

For the reasons set forth above, liability may not be imposed on Evers for his presence at NAACP meetings or his active participation in the boycott itself. To the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his "threats" of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award. Respondents point to Evers' speeches, however, as justification for the chancellor's damages award. Since respondents would impose liability on the basis of a public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment—we approach this suggested basis of liability with extreme care.

There are three separate theories that might justify holding Evers liable for the unlawful conduct of others. First, a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.

While many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.

It is clear that "fighting words"—those that provoke immediate violence—are not protected by the First Amendment. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572. Similarly, words that create an immediate panic are not entitled to constitutional protection. *Schenck* v. *United States*, 249 U. S. 47.[70] This Court has made clear, however, that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment. In *Brandenburg* v. *Ohio*, 395 U. S. 444, we reversed the conviction of a Ku Klux Klan leader for threatening "revengeance" if the "suppression" of the white race continued; we relied on

---

[70] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U. S., at 52.

"the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. See *Noto* v. *United States*, 367 U. S., at 297–298 ("the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action"). See also *Whitney* v. *California*, 274 U. S. 357, 372 (Brandeis, J., concurring).

The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however—with the possible exception of the Cox incident—the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech; the chancellor made no finding of any violence after the challenged 1969 speech. Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.[71]

---

[71] In *Watts* v. *United States*, 394 U. S. 705, the petitioner was convicted of willfully making a threat to take the life of the President. During a pub-

For these reasons, we conclude that Evers' addresses did not exceed the bounds of protected speech. If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. But any such theory fails for the simple reason that there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence.[72] The chancellor's findings are not sufficient to establish that Evers had a duty to "repudiate" the acts of violence that occurred.[73] The findings are constitutionally inadequate to support the damages judgment against him.

The liability of the NAACP derived solely from the liability of Charles Evers.[74] The chancellor found:

> "The national NAACP was well-advised of Evers' actions, and it had the option of repudiating his acts or ratifying them. It never repudiated those acts, and therefore, it is deemed by this Court to have affirmed them." App. to Pet. for Cert. 42b–43b.

---

lic rally at the Washington Monument, petitioner stated in a small discussion group:

"'They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J.'" *Id.*, at 706.

This Court summarily reversed. The Court agreed with the petitioner that the statement, taken in context, was "a kind of very crude offensive method of stating a political opposition to the President." *Id.*, at 708.

[72] There is evidence that Evers occasionally served as a "store watcher," but there is no suggestion that anything improper occurred on those occasions.

[73] See n. 69, *supra*.

[74] Indeed it is noteworthy that Aaron Henry—who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP—was the only defendant dismissed by the chancellor on the merits.

Of course, to the extent that Charles Evers' acts are insufficient to impose liability upon him, they may not be used to impose liability on his principal. On the present record, however, the judgment against the NAACP could not stand in any event.

The associational rights of the NAACP and its members have been recognized repeatedly by this Court.[75] The NAACP—like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority.[76] Cf. *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556. Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified.

The chancellor made no finding that Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence or to threaten violent conduct. The evidence in the record suggests the contrary. Aaron Henry, President of the Mississippi State Conference of the NAACP and a member of the Board of Directors of the national organization, testified that the statements attributed to Evers were directly contrary to NAACP policy. Record 4930.[77] Similarly, there is no evidence that the NAACP rati-

---

[75] Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293; *NAACP* v. *Button*, 371 U. S. 415; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539; *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288.

[76] There is no question that Charles Evers—as its only paid representative in Mississippi—was an agent of the NAACP.

[77] In a footnote to his discussion of the NAACP's liability, the chancellor wrote:

"Aaron E. Henry, a prominent black leader in the State of Mississippi, who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP, testified that the NAACP 'absolutely did not approve of the way the boycott was being conducted in Port Gibson.' There is also evidence in the record tending to show that fied—or even had specific knowledge of—any of the acts of violence or threats of discipline associated with the boycott. Henry testified that the NAACP never authorized, and never considered taking, any official action with respect to the boycott. *Id.*, at 4896. The NAACP supplied no financial aid to the boycott. *Id.*, at 4940. The chancellor made no finding that the national organization was involved in any way in the boycott.[78]

To impose liability without a finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment. As Justice Douglas noted in *NAACP* v. *Overstreet*, 384 U. S. 118, dissenting from a dismissal of a writ of certiorari found to have been improvidently granted:

> "To equate the liability of the national organization with that of the Branch in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it. The rights of political association are fragile enough without adding the

---

Evers was called to account by the national NAACP because of the manner in which the boycott was conducted. However, the NAACP took no action whatever to curb Evers' activities in this connection." App. to Pet. for Cert. 42b, n. 9.

Henry's testimony concerning Evers' having been "called to account by the National NAACP" concerned Evers' failure to make proper reports and Henry's understanding that there was a personality clash between Evers and an executive of the NAACP. Record 4905, 4907. We have found no evidence in the record that any representative of the national NAACP was advised of any facts concerning the manner in which the Port Gibson boycott was conducted.

[78] The chancellor did find that the NAACP had posted bond and provided legal representation for arrested boycott violators. Since the NAACP regularly provides such assistance to indigent black persons throughout the country, this finding cannot support a determination that the national organization was aware of, and ratified, unauthorized violent conduct. Counsel for respondents does not contend otherwise.

> additional threat of destruction by lawsuit. We have not been slow to recognize that the protection of the First Amendment bars subtle as well as obvious devices by which political association might be stifled. See *Bates* v. *Little Rock*, 361 U. S. 516, 523. Thus we have held that forced disclosure of one's political associations is, at least in the absence of a compelling state interest, inconsistent with the First Amendment's guaranty of associational privacy. *E. g., DeGregory* v. *New Hampshire*, 383 U. S. 825; *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539, 543–546; *Shelton* v. *Tucker*, 364 U. S. 479; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 462–463. Recognizing that guilt by association is a philosophy alien to the traditions of a free society (see *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 245–246, and the First Amendment itself, we have held that civil or criminal disabilities may not be imposed on one who joins an organization which has among its purposes the violent overthrow of the Government, unless the individual joins knowing of the organization's illegal purposes (*Wieman* v. *Updegraff*, 344 U. S. 183) and with the specific intention to further those purposes. See *Elfbrandt* v. *Russell*, [384 U. S., at] 11; *Aptheker* v. *Secretary of State*, 378 U. S. 500." *Id.*, at 122.

The chancellor's findings are not adequate to support the judgment against the NAACP.

IV

In litigation of this kind the stakes are high. Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity.[79] And

---

[79] In discussing the doctrine of criminal conspiracy, Justice Jackson noted:

"The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.[80]

At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, petitioners' ultimate objectives were unquestionably legitimate. The charge of illegality—like the claim of constitutional protection—derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully

---

itself. 'Privy conspiracy' ranks with sedition and rebellion in the Litany's prayer for deliverance. Conspiratorial movements do indeed lie back of the political assassination, the *coup d'etat*, the *putsch*, the revolution, and seizures of power in modern times, as they have in all history." *Krulewitch* v. *United States*, 336 U. S., at 448 (concurring opinion).

[80] "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." 1 A. de Tocqueville, Democracy in America 203 (P. Bradley ed. 1954).

identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. The findings of the chancellor, framed largely in the light of two legal theories rejected by the Mississippi Supreme Court, are constitutionally insufficient to support the judgment that all petitioners are liable for all losses resulting from the boycott.

The judgment is reversed. The case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST concurs in the result.

JUSTICE MARSHALL took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

Portions of speech delivered by Charles Evers on April 19, 1969 (Record 1092–1108):

"Thank you very much. We want our white friends here to know what we tell them happens to be so. Thank you for having the courage to walk down those streets with us. We thank you for letting our white brethren know that guns and bullets ain't gonna stop us. (No) (No) We thank you for letting our white brothers know that Port Gibson ain't none of their town. (Amen) (Applause) That Port Gibson is all of our town. (Applause) That black folks, red folks, Chinese and Japanese alike (Yeah) (That's right.), that we are going to have our share. (Yeah, we are.)

* * * * *

"We are going to beat you because we know you can't trick us no more. (yea) You are not going to be able to fool us by getting somebody to give us a drink of whiskey no more. (Applause) You ain't gonna be able to fool us by somebody giving us a few dollars no more. (Applause) We are gonna take your money and drink with you and then we're gonna (Applause) vote against you. Then we are going to elect a sheriff in this county and a sheriff that is responsible, that won't have to run and grab the telephone and call up the blood-thirsty highway patrol when he gets ready (Yeah) to come in and beat innocent folks down to the ground for no cause. (That's right) (Applause) (Boo) We are going to elect a sheriff that can call his deputies and represent black leaders in the community and stop whatever problem there is. (Yeah) (That's right.)

"Then we are going to do more than that. The white merchants of this town are so wrapped up in the power structure here, since you love your Police Department so well, since you support them so well (Yeah), we are going to let them buy your dirty clothes and your filthy, rotten groceries.

"Oh, no, white folks, we ain't going to shoot you with no bullet. (That's right.) We are going to shoot you with our ballots and with our bucks. (Yea) (That's right.) We are going to take away from you the thing that you have had over us all these years. (Yeah) Political power and economic power. While you kill our brothers and our sisters and rape our wives and our friends. (Yeah) You're guilty. You're guilty because you don't care a thing about anybody. (Yes.) And when you go and let a big, black burly nigger like you get on the police force (Yea) go down and grab another black brother's arm and hold it while a white racist stole him from us, and he's a liar if he says he didn't hold him.

. . . . .

"We mean what we are saying. We are not playing. (Right) We better not even think one of us is black. You better not even be caught near one of these stores. (Applause)

"We don't want you caught in Piggly-Wiggly. You remember how he grinned at us four years ago? (Yeah) You know how when he took office he grinned at us? (Yeah) He ain't hired nobody yet. (That's right) (No) And you know old Jitney Jungle down there with those funny letters down on the end? (That's right) (Applause) He haven't hired nobody in there yet. (No) Do you know poor ole M & M or whatever it stands for, mud and mush, I guess. (Applause) They're out here on the highway and they haven't hired none of us yet.

"Do you know Ellis who had a part-time boy all his life? He ain't hired nobody, is he, yet? (No) Then we got ole Stampley, and ninety-nine and three-fourths of his sales are black folks business. He got the nerve to tell me he ain't gonna put no nigger ringing his cash register. I got news for you, Brother Stampley. You can ring it your damn self. (Extra loud applause.) I want some of you fat cats after this meeting who wants three of our young boys who ain't a'scar'd of white folks (Applause) (Me) and we want you that's willing to follow the rules now to go down by Brother Stampley's and serve notice on him with our placards that we ain't coming no more.

"Then we are going to tell all the young men that drive Piggly-Wiggly trucks now (Yeah) (Be careful, Son.) because the soul brothers and the spirit is watching you. (Extra loud applause.)

"All right, Brother Wolf, you're next. (Applause) We got a couple of 'em to come down by Brother Wolf's. We mean business, white folks. We ain't gonna shoot you all, we are going to hit you where it hurts most. (In the pocketbook) (Applause) In the pocketbook and in the ballot box. (Applause) We may as well tell our friends at Alcorn to stay away from up here. (Yea) Now, you say, 'What's wrong with you niggers?' I'll tell you what is wrong with us niggers; We are tired of you white folks, you racists and you bigots mistreating us. (Yeah) We are tired of paying you to deny us the right to even exist. (Tell 'em about it.) And we ain't coming back, white folks. (We ain't.)

"You all put a curfew on us at eight o'clock tonight. We are going to do you better than that. We are going to leave at one-thirty. (Loud applause) We are going to leave at one-thirty and we ain't coming back, white folks.

. . . . .

"We are going to have Brother McCay; we are going to have our newly elected mayor who we elected, we are going to have him around here, too. Come on back, my dear friend. He say, 'Naw, brother, we ain't coming.' 'Have you got rid of all those bigots you got on your police force?' 'No.' 'Have you hired Negroes in all them stores?' 'No.' 'Well, we ain't coming back.' (Right) That's all we gonna do. You know, what they don't realize is you put on this curfew, that is all we needed. Let me just give them some instructions. We are going to buy gas only from the Negro-owned service stations. We agreed on it, remember? Now, don't back upon your agreement. (Yea) I don't care how many Negroes working on it, that's too bad. We are going only to Negro-owned service stations. And we are going only—the only time you will see us around on this street, now listen good, you are going to Lee's Grocery and other stores on this end. Is that clear? (Yeah) (Applause)

"We don't want to go to none of them drugstores. They get us confused. Now, who am I going to get my medicine from? Let us know in time and we will be glad to furnish a car free to carry you anywhere you have to go to get a prescription filled. You can't beat this. (No) It won't cost you a dime. You go to any of the local black businessmen and tell them you have got to go to Vicksburg to get your stuff. And then if they don't carry you, let us know. We'll take care of them later. (Applause) Now, you know, we have got a little song that says, 'This is your thing, do what you want to do.' (Applause) This is our thing, let's do what we want to do with it. Let's make sure now—if you be disobedient now you are going to be in trouble. Remember that, now, listen. Listen good. They are going to start saying, 'You know what, Evers is down there with his goon squad, . . .' Now, we know Claiborne County,—'with his goon squad harassing poor ole niggers.'

"Well, good white folks you have been harassing us all our lives. (Applause) And if we decided to harass you that's our business. (That's right) They are our children and we are going to discipline them the way we want to. Now, be sure you get all this right on all these tape recorders. Whatever I say on this trip I will say it in Jackson. (Amen) (Glory) And I will say it in Washington and New York. White folks ain't gonna never control us no more. (Applause)

. . . . .

"Now, my dear friends, the white folks have got the message. I hope you have got the message and tell every one of our black brothers until all these people are gone, you voted on this in the church, don't let me down, and don't let yourself down. We agreed in the church that we would vacate this town until they have met those requests, the white folks don't demand nothing out of us. All right, white folks, we are just saying until you decide when you want to do these little things we beg of you, we are not coming back. (No way)

"None of us better not be caught up here. (Yea) I don't care how old you are, I don't care how sick you are, I don't care how crazy you are, you better not be caught on these streets shopping in these stores until these demands are met. (Applause)

"Now, let's get together. Are you for this or against it? (Applause) (For it.) Remember you voted this. We intend to enforce it. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. (That's right.) He ain't going to offer to sleep with none of us men, I can tell you that. (Applause) Let's don't break our little rules that you agreed upon here.

. . . . .

"Let's go to the funeral of our young son whenever the funeral is. I don't want you to come with hate because that is not going to solve our problems. (No hate.) We don't want you to hate the white folks here in Port Gibson. That is not going to solve it. If you hate what they have done, I hate to get personal, I hate what they did so much to Medgar, (I know.) I ain't going to ever stop hating them for that. But I am going to chase them in the way what I know is right and just. I am not going to lay out in the bushes and shoot no white folks. That's wrong. I am not gonna go out here and bomb none of them's home. (No) That's not right. But I am going to do everything in my power to take away all the power, political power, legal power that they possess anywhere I live. We are going to compete against them. When we blacks learn to support and respect each other, then and not until then, will white folks respect us. (Applause)

"Now, you know I trust white folks and I mean every word I say. But it comes a time when we got to make up in our mind individually, are we going to make those persons worthwhile. We done talked and raised all kind of sand all day here, now, what is really going to prove it, are we going to live up to what we have said? (Applause) Now if there is any one of us breaks what we agreed upon, you are just as guilty as that little trigger-happy, blood-thirsty rascal. (Tell 'em about it.)

. . . . .

"I go all over this country, and I ought not to tell you white folks this, and I tell other white folks that some day we are going to get together in Mississippi, black and white, and work out our problems. And we are ready to start whenever you are. If you are ready to start, we are. We ain't going to let you push us, not one inch. (That's right.) If you come on beating us, we are going to fight back. (Right) We got our understanding. We are all God's children. The same man that brought you all here brought us. You could have been black just like we are. We could have been white and baldheaded just like you are. (Laughter) (Inaudible) We are going to work hard at this, Dan. We are going to be organized this time. We ain't going to be bought off and talked off. We are going to elect the county sheriff here this next time that don't need the highway patrol. Now, you see, Dan had a good chance to set himself up right, but he goofed it. He goofed. (Yeah) He blew it. (Laughter) Don't forget that, heah. (Right) It brings back memories like you know you remember things we do.

"Now, if you don't think it is necessary, we don't have to go back to the church. If you want to go back there, we can. I want you to make sure here that we are going to leave this town to our white brothers and we ain't coming back no more until all our requests have been met. Is that the common consent of all of you here? (Applause) (Let's go back to the church.) All right. Are we willing to make sure that everyone of us will be sure that none of the rest of our black brothers violate our . . . (Yea) We are all saying it now. Let's not say it now so much on my part. You know, I'm just sort of leading, you know, how these lawyers are, leading our folks on to say what has to be said. And that's the case. Let's make us a white town. We would like for you to start it. Be courteous now. Don't mistreat nobody. Tell them, in a nice forceful way, the curfew is going to be on until they do what we ask them."

SPORHASE ET AL. *v.* NEBRASKA EX REL. DOUGLAS, ATTORNEY GENERAL

APPEAL FROM SUPREME COURT OF NEBRASKA

No. 81-613. Argued March 30, 1982—Decided July 2, 1982

A Nebraska statute provides that any person who intends to withdraw ground water from any well located in the State and transport it for use in an adjoining State must obtain a permit from the Nebraska Department of Water Resources. If the Director of Water Resources finds that such withdrawal is reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare, he will grant the permit if the State in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that State for use in Nebraska. Appellants jointly own contiguous tracts of land in Nebraska and Colorado, on which a well on the Nebraska tract pumps ground water for irrigation of both the Nebraska and Colorado tracts, but they never applied for the permit required by the statute. Appellee brought an action in a Nebraska state court to enjoin appellants from transferring the water across the border without a permit. Rejecting the defense that the statute imposed an undue burden on interstate commerce, the trial court granted the injunction. The Nebraska Supreme Court affirmed.

Held:

1. Ground water is an article of commerce and therefore subject to congressional regulation. Pp. 945-954.

(a) Although appellee's claimed greater ownership interest in ground water than in certain other natural resources may not be irrelevant to Commerce Clause analysis, it does not remove Nebraska ground water from such scrutiny, since appellee's argument is still based on the legal fiction of state ownership. Pp. 945-952.

(b) The States' interests in conserving and preserving scarce water resources in the arid Western States clearly have an interstate dimension. The agricultural markets supplied by irrigated farms provide the archtypical example of commerce among the States for which the Framers of the Constitution intended to authorize federal regulation. Here, the multistate character of the aquifer underlying appellants' tracts of land, as well as parts of Texas, New Mexico, Oklahoma, and Kansas, demonstrates that there is a significant federal interest in conservation as well as in fair allocation of diminishing water resources. Pp. 952-954.

2. The reciprocity requirement of the Nebraska statute violates the Commerce Clause as imposing an impermissible burden on interstate

commerce. While the first three conditions set forth in the statute for granting a permit—that the withdrawal of the ground water be reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare—do not on their faces impermissibly burden interstate commerce, the reciprocity provision operates as an explicit barrier to commerce between Nebraska and its adjoining States. Nebraska therefore has the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. Such requirement, when superimposed on the first three restrictions, fails to clear this initial hurdle, since there is no evidence that it is narrowly tailored to the conservation and preservation rationale. Thus, it does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. Pp. 954–958.

3. Congress has not granted the States permission to engage in ground water regulation that would otherwise be impermissible. Although there are 37 federal statutes and a number of interstate compacts demonstrating Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional restraints on such state law. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal water projects nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. Pp. 958–960.

208 Neb. 703, 305 N. W. 2d 614, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 961.

Richard A. Dudden argued the cause and filed a brief for appellants.

G. Roderic Anderson, Assistant Attorney General of Nebraska, argued the cause for appellee. With him on the brief was *Paul L. Douglas*, Attorney General, and *Steven C. Smith*, Special Assistant Attorney General.*

---

*Briefs of *amici curiae* urging affirmance were filed by *Jeff Bingaman*, Attorney General, and *Richard A. Simms*, *Jeffrey L. Fornaciari*, and *Stephen D. Dillon*, Special Assistant Attorneys General, for the State of New

JUSTICE STEVENS delivered the opinion of the Court.

Appellants challenge the constitutionality of a Nebraska statutory restriction on the withdrawal of ground water from any well within Nebraska intended for use in an adjoining State. The challenge presents three questions under the Commerce Clause:[1] (1) whether ground water is an article of commerce and therefore subject to congressional regulation; (2) whether the Nebraska restriction on the interstate transfer of ground water imposes an impermissible burden on commerce; and (3) whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible.

Mexico; by *John P. Frank* and *William L. Lutz* for the Elephant Butte Irrigation District et al.; by *Jon T. Brown*, *William B. Bonvillian*, and *Stephen E. Roady* for the National Agricultural Lands Center et al.; and by *Patrick A. Parenteau* for the National Wildlife Federation et al.

Briefs of *amici curiae* were filed for the State of California by *George Deukmejian*, Attorney General, *R. H. Connett*, Assistant Attorney General, and *Roderick Walston* and *Gregory K. Wilkinson*, Deputy Attorneys General; for the State of Colorado et al. by *J. D. MacFarlane*, Attorney General of Colorado, *Richard F. Hennessey*, Deputy Attorney General, *Mary J. Mullarkey*, Solicitor General, and *Dennis M. Montgomery* and *William A. Paddock*, Assistant Attorneys General, *Steven F. Freudenthal*, Attorney General of Wyoming, *Walter Perry*, Senior Assistant Attorney General, and *Lawrance J. Wolfe*, Assistant Attorney General, *Robert T. Stephan*, Attorney General of Kansas, *Mark D. Meierhenry*, Attorney General of South Dakota, *John Ashcroft*, Attorney General of Missouri, *Richard H. Bryan*, Attorney General of Nevada, and *George Campbell*, Deputy Attorney General, *Robert O. Wefald*, Attorney General of North Dakota, and *David L. Wilkinson*, Attorney General of Utah; and for the City of El Paso by *Harry M. Reasoner* and *Charles J. Meyers*.

[1] Article I, § 8, cl. 3, of the United States Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." For general explanations of Commerce Clause analysis, see, *e. g.*, *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U. S. 648, 652–653 (1981); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 766–770 (1945).

Appellants jointly own contiguous tracts of land in Chase County, Nebraska, and Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for irrigation of both the Nebraska tract and the Colorado tract. Previous owners of the land registered the well with the State of Nebraska in 1971, but neither they nor the present owners applied for the permit required by Neb. Rev. Stat. § 46-613.01 (1978). That section provides:

> "Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska."

Appellee brought this action to enjoin appellants from transferring the water across the border without a permit.[2] The trial court rejected the defense that the statute imposed an undue burden on interstate commerce and granted the injunction. The Nebraska Supreme Court affirmed. 208 Neb. 703, 305 N. W. 2d 614 (1981). It held that, under Nebraska law, ground water is not "a market item freely transferable for value among private parties, and therefore [is] not an article of commerce." *Id.*, at 705, 305 N. W. 2d, at

---

[2] Because of the reciprocity requirement of § 46-613.01, appellants would not have been granted a permit had they applied for one. Their failure to submit an application therefore does not deprive them of standing to challenge the legality of the reciprocity requirement. Cf. *Larson* v. *Valente*, 456 U. S. 228 (1982).

616.[3] The Chief Justice, while agreeing that the statutory criteria governing the transfer of water to an adjoining State did not violate the Commerce Clause, dissented on the narrow ground that appellee violated both the Federal and Nebraska Constitutions by attempting "to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which citizens of this state have no control." *Id.*, at 713, 305 N. W. 2d, at 620.

I

In holding that ground water is not an article of commerce, the Nebraska Supreme Court and appellee cite as controlling precedent *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349 (1908). In that case a New Jersey statute prohibited the interstate transfer of any surface water located within the State.[4] The Hudson County Water Co. nevertheless contracted with New York City to supply one of its boroughs with water from the Passaic River in New Jersey. The State Attorney General sought from the New Jersey courts an injunction against fulfillment of the contract. Over the water company's objections that the statute impaired the obligation of contract, took property without just compensation, interfered with interstate commerce, denied New York citizens the privileges afforded New Jersey citizens, and denied New York citizens the equal protection of the laws, the injunction was granted. This Court, in an opinion by Justice Holmes, affirmed.

---

[3] The Nebraska Supreme Court also rejected appellants' equal protection and due process challenges. Appellants renew those challenges before this Court, but we need not reach these issues in light of our disposition of the Commerce Clause claim.

[4] The Court quoted the statute: "'It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein.'" 209 U. S., at 353.

Most of the Court's opinion addresses the just compensation claim. Justice Holmes refused to ground the Court's holding, as did the New Jersey state courts,[5] on "the more or less attenuated residuum of title that the State may be said to possess." *Id.*, at 355. For the statute was justified as a regulatory measure that, on balance, did not amount to a taking of property that required just compensation. Putting aside the "problems of irrigation," the State's interest in preserving its waters was well within its police power.[6] That interest was not dependent on any demonstration that the State's water resources were inadequate for present or future use. The State "finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.*, at 357.

Having disposed of the just compensation claim, Justice Holmes turned very briefly to the other constitutional challenges. In one paragraph, he rejected the Contract Clause claim. In the remaining paragraph of the opinion, he rejected all the other defenses. His treatment of the Commerce Clause challenge consists of three sentences: "A man cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by *Geer* v. *Connecticut*, 161 U. S. 519 [(1896)]." *Ibid.*

---

[5] "The Courts below assumed or decided and we shall assume that the defendant represents the rights of a riparian proprietor, and on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the Court of Errors and Appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the State. It reinforced the State's rights by the State's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the State was warranted in prohibiting the acquisition of the title to water on a larger scale." *Id.*, at 354.

[6] "The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." *Id.*, at 356.

While appellee relies upon *Hudson County*, appellants rest on our summary affirmance of a three-judge District Court judgment in *City of Altus* v. *Carr*, 255 F. Supp. 828 (WD Tex.), summarily aff'd, 385 U. S. 35 (1966). The city of Altus is located near the southern border of Oklahoma. Large population increases rendered inadequate its source of municipal water. It consequently obtained from the owners of land in an adjoining Texas county the contractual right to pump the ground water underlying that land and to transport it across the border. The Texas Legislature thereafter enacted a statute that forbade the interstate exportation of ground water without the approval of that body.[7] The city filed suit in Federal District Court, claiming that the statute violated the Commerce Clause.

The city relied upon *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911), which invalidated an Oklahoma statute that prevented the interstate transfer of natural gas produced within the State,[8] and *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), which invalidated a West Virginia statute that accorded a preference to the citizens of that State in the purchase of natural gas produced therein.[9] The Texas Attorney General defended the statute on two grounds. First, he asserted that its purpose was to conserve and protect the State's water resources by regulating the withdrawal of ground water. The District Court rejected that defense because similar conservation claims had met defeat in *West* v. *Kansas Natural Gas Co., supra*, and *Pennsylvania* v. *West Virginia, supra.*[10] Second, the State argued that the statute regulated ground water and that ground water is not an article of commerce, citing *Geer* v. *Connecticut*, 161 U. S. 519 (1896), and *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349 (1908). The court rejected this argument since the statute directly regulated the interstate transportation of water that had been pumped from the ground, and under Texas law such water was an article of commerce. The court then had little difficulty in concluding that the statute imposed an impermissible burden on interstate commerce.[11]

---

[7] The District Court quoted the statute: "'No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it.'" 255 F. Supp., at 830.

[8] Justice Holmes, the author of the Court's opinion in *Hudson County*, noted his dissent. See 221 U. S., at 262.

---

[9] Justice Holmes dissented, expressing the view that the Court's decision was inconsistent with *Hudson County*. See 262 U. S., at 603.

[10] The District Court opinion, 255 F. Supp., at 839, included these quotations from the two cases:

"The statute of Oklahoma recognizes [natural gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber. Both of these products might be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle?" *West* v. *Kansas Natural Gas Co.*, 221 U. S., at 255.

"Another consideration advanced to the same end is that natural gas is a natural product of the State and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the State. If the situation be as stated, it affords no ground for the assumption by the State of the power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere." *Pennsylvania* v. *West Virginia*, 262 U. S., at 598.

In summarily affirming the District Court in *City of Altus*, we did not necessarily adopt the court's reasoning. Our affirmance indicates only our agreement with the result reached by the District Court. *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 499 (1981). That result is not necessarily inconsistent with the Nebraska Supreme Court's holding in this case. For Texas law differs significantly from Nebraska law regarding the rights of a surface owner to ground water that he has withdrawn. According to the District Court in *City of Altus*, the "rule in Texas was that an owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property." 255 F. Supp., at 833, n. 8. Since ground water, once withdrawn, may be freely bought and sold in States that follow this rule, in those States ground water is appropriately regarded as an article of commerce. In Nebraska the surface owner has no comparable interest in ground water. As explained by the Nebraska Supreme Court, "'the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.'" 208 Neb., at 705, 305 N. W. 2d, at 617 (quoting *Olson* v. *City of Wahoo*, 124 Neb. 802, 811, 248 N. W. 304, 308 (1933)).

---

[11] "Considering the statute in question only with regard to whether it regulates the transportation and use of water after it has been withdrawn from a well and becomes personal property, such statute constitutes an unreasonable burden upon and interference with interstate commerce. Moreover, on the facts of this case it appear[s] to us that [the Texas statute] does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States as in the case of West v. Kansas Natural Gas Co. In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant; for example, from Wilbarger County to El Paso County, Texas. Obviously, the statute had little relation to the cause of conservation." 255 F. Supp., at 839–840.

City of Altus, however, is inconsistent with *Hudson County*. For in the latter case the Court found *Geer* v. *Connecticut*, *supra*, to be controlling on the Commerce Clause issue. *Geer*, which sustained a Connecticut ban on the interstate transportation of game birds captured in that State, was premised on the theory that the State owned its wild animals and therefore was free to qualify any ownership interest it might recognize in the persons who capture them. One such restriction is a prohibition against interstate transfer of the captured animals. This theory of public ownership was advanced as a defense in *City of Altus*. The State argued that it owned all subterranean water and therefore could recognize ownership in the surface owner who withdraws the water, but restrict that ownership to use of the water within the State. That theory, upon which the Commerce Clause issue in *Hudson County* was decided, was rejected by the District Court in *City of Altus*.[12] In expressly overruling *Geer* three years ago, this Court traced the demise of the public ownership theory and definitively recast it as "'but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" *Hughes* v. *Oklahoma*, 441 U. S. 322, 334 (1979) (quoting *Toomer* v. *Witsell*, 334 U. S. 385, 402 (1948)). See also *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S. 371, 384–387 (1978); *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 284–285 (1977). In *Hughes* the Court found the State's interests insufficient to sustain a ban on the interstate transfer of natural minnows seined from waters within the State.

---

[12] "This statute, however, seeks to prohibit the production of underground water for the purpose of transporting same in interstate commerce, and has the effect of prohibiting the interstate transportation of such water after it has become personal property. Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone as in the Pennsylvania and West cases, or prohibits the withdrawal of such substance where the intent

Appellee insists, however, that Nebraska water is distinguishable from other natural resources. The surface owner who withdraws Nebraska ground water enjoys a lesser ownership interest in the water than the captor of game birds in Connecticut or minnows in Oklahoma or ground water in Texas, for in *Geer*, *Hughes*, and *City of Altus* the States permitted intrastate trade in the natural resources once they were captured. Although appellee's greater ownership interest may not be irrelevant to Commerce Clause analysis, it does not absolutely remove Nebraska ground water from such scrutiny. For appellee's argument is still based on the legal fiction of state ownership. The fiction is illustrated by municipal water supply arrangements pursuant to which ground water is withdrawn from rural areas and transferred to urban areas. Such arrangements are permitted in Nebraska, see *Metropolitan Utilities District* v. *Merritt Beach Co.*, 179 Neb. 783, 140 N. W. 2d 626 (1966), but the Nebraska Supreme Court distinguished them on the ground that the

---

is to transport such in interstate commerce, the result upon interstate commerce is the same. In both situations, the purpose and intent of the statute and the end result thereof is to prohibit the interstate transportation of an article of commerce." *Id.*, at 840.

transferor was only permitted to charge as a price for the water his costs of distribution and not the value of the water itself. 208 Neb., at 708, 305 N. W. 2d, at 618. Unless demand is greater than supply, however, this reasoning does not distinguish minnows, the price of which presumably is derived from the costs of seining and of transporting the catch to market. Even in cases of shortage, in which the seller of the natural resource can demand a price that exceeds his costs, the State's rate structure that requires the price to be cost-justified is economically comparable to price regulation. A State's power to regulate prices or rates has never been thought to depend on public ownership of the controlled commodity. It would be anomalous if federal power to regulate economic transactions in natural resources depended on the characterization of the payment as compensation for distribution services, on the one hand, or as the price of goods, on the other. Cf. *In re Rahrer*, 140 U. S. 545, 558 (1891).

The second asserted distinction is that water, unlike other natural resources, is essential for human survival. Appellee, and the *amici curiae* that are vitally interested in conserving and preserving scarce water resources in the arid Western States, have convincingly demonstrated the desirability of state and local management of ground water.[13]

---

[13] In *California* v. *United States*, 438 U. S. 645, 648 (1978), we explained some of the circumstances that support a general policy of local water management under differing legal systems:

"The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climate regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences. Those who first set foot in North America from ships sailing the tidal estuaries of Virginia did not confront the same problems as those who sailed flat boats down the Ohio River in search of new sites to farm. Those who cleared the forests in the old Northwest Territory faced totally different physiographic problems from those who built sod huts on the Great Plains. The final expansion of our Nation in the 19th century into the arid lands beyond the hundredth meridian of longitude, which had been shown on early maps as the 'Great American Desert,' brought the participants in

But the States' interests clearly have an interstate dimension. Although water is indeed essential for human survival, studies indicate that over 80% of our water supplies is used for agricultural purposes.[14] The agricultural markets supplied by irrigated farms are worldwide. They provide the archtypical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation. The multistate character of the Ogallala aquifer—underlying appellants' tracts of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas[15]—confirms the view that there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource. Cf. *Arizona* v. *California*, 373 U. S. 546 (1963).

The Western States' interests, and their asserted superior competence, in conserving and preserving scarce water resources are not irrelevant in the Commerce Clause inquiry. Nor is appellee's claim to public ownership without significance. Like Congress' deference to state water law, see *infra*, at 958–960, these factors inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable. But appellee's claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burden-on-commerce analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 621–623 (1978). If Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws.

---

that expansion face to face with the necessity for irrigation in a way that no previous territorial expansion had."

[14] Soil Conservation Service, U. S. Dept. of Agriculture, America's Soil and Water: Conditions and Trends 21 (1980).

[15] Comptroller General, Report to Congress, Ground Water Overdrafting Must Be Controlled 7–8 (1980).

Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.

II

Our conclusion that water is an article of commerce raises, but does not answer, the question whether the Nebraska statute is unconstitutional. For the existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, of the uses of water within the State, or indeed, of interstate commerce in water. *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 766–767 (1945); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 548–549 (1944); *Cooley* v. *Board of Wardens*, 12 How. 299, 319 (1852). Determining the validity of state statutes affecting interstate commerce requires a more careful inquiry:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970) (citation omitted).

The only purpose that appellee advances for § 46–613.01 is to conserve and preserve diminishing sources of ground water. The purpose is unquestionably legitimate and highly important,[16] and the other aspects of Nebraska's ground water regulation demonstrate that it is genuine. Appellants' land in Nebraska is located within the boundaries of the Upper Republican Ground Water Control Area, which was designated as such by the Director of the Nebraska Department of Water Resources based upon a determination that there is "[a]n inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply." Neb. Rev. Stat. § 46–658(1) (Supp. 1981); see App. 56–60. Pursuant to § 46–666(1), the Upper Republican Natural Resources District has promulgated special rules and regulations governing ground water withdrawal and use. See App. 61–82. The rules and regulations define as "critical" those townships in the control area in which the annual decline of the ground water table exceeds a fixed percentage; appellants' Nebraska tract is located within a critical township. The rules and regulations require the installation of flow meters on every well within the control area, specify the amount of water per acre that may be used for irrigation, and set the spacing that is required between wells. They also strictly limit the intrastate transfer of ground water: transfers are only permitted between lands controlled by the same ground water user, and all transfers must be approved by the District Board of Directors. *Id.*, at 68–69.

---

[16] See *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 188 (1950) ("Insofar as conservation is concerned, the national interest and the interest of producing states may well tend to coincide").

The State's interest in conservation and preservation of ground water is advanced by the first three conditions in § 46–613.01 for the withdrawal of water for an interstate transfer. Those requirements are "that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare." Although Commerce Clause concerns are implicated by the fact that § 46–613.01 applies to interstate transfers but not to intrastate transfers, there are legitimate reasons for the special treatment accorded requests to transport ground water across state lines. Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation. At least in the area in which appellants' Nebraska tract is located, the first three standards of § 46–613.01 may well be no more strict in application than the limitations upon intrastate transfers imposed by the Upper Republican Natural Resources District.

Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems from the "confluence of [several] realities." *Hicklin* v. *Orbeck*, 437 U. S. 518, 534 (1978). First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other. See *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, 533 (1949). Second, the legal expectation that under certain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, see, *e. g.*, *Wyoming* v. *Colorado*, 353 U. S. 953 (1957), but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources. Third, although appellee's claim to public ownership of Nebraska ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. See *Hicklin* v. *Orbeck*, *supra*, at 533–534. In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership of other natural resources. See *supra*, at 950–951. Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage. See *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980); cf. *Philadelphia* v. *New Jersey*, 437 U. S., at 627–628, and n. 6; *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S. 371 (1978). A facial examination of the first three conditions set forth in §46–613.01 does not, therefore, indicate that they impermissibly burden interstate commerce. Appellants, indeed, seem to concede their reasonableness.

Appellants, however, do challenge the requirement that "the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska"—the reciprocity provision that troubled the Chief Justice of the Nebraska Supreme Court. Because Colorado forbids the exportation of its ground water,[17] the reciprocity provision operates as an explicit barrier to commerce between the two States. The State therefore bears the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. *Hughes* v. *Oklahoma*, 441 U. S., at 336; *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349, 354 (1951).

The reciprocity requirement fails to clear this initial hurdle. For there is no evidence that this restriction is narrowly tailored to the conservation and preservation rationale. Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska. If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. A demonstrably arid State conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water. Appellee, however, does not claim that such evidence exists. We therefore are not persuaded that the reciprocity requirement—when superimposed on the first three restrictions in the statute—significantly advances the State's legitimate conservation and preservation interest; it surely is not narrowly tailored to serve that purpose. The reciprocity requirement does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. *Hughes* v. *Oklahoma*, *supra*, at 337.[18]

---

[17] Colorado Rev. Stat. §37–90–136 (1973) provides as follows:

"For the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all ground waters of this state, whether tributary or nontributary to a natural stream, which waters are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance, and general welfare of the state, it is unlawful for any person to divert, carry, or transport by ditches, canals, pipelines, conduits, or any other manner any of the ground waters of this state, as said waters are in this section defined, into any other state for use therein."

III

Appellee's suggestion that Congress has authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water is not well founded. The suggestion is based on 37 statutes in which Congress has deferred to state water law, and on a number of interstate compacts dealing with water that have been approved by Congress.

---

[18] The reciprocity requirement cannot, of course, be justified as a response to another State's unreasonable burden on commerce. *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366, 379–381 (1976).

Abstracts of the relevant sections of the 37 statutes relied upon by appellee were submitted in connection with the Hearings on S. 1275 before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess., 302–310 (1964). Appellee refers the Court to that submission but only discusses § 8 of the Reclamation Act of 1902, 32 Stat. 390. That section, it turns out, is typical of the other 36 statutes. It contains two parts. The first provides that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." Such language defines the extent of the federal legislation's pre-emptive effect on state law. *New England Power Co.* v. *New Hampshire*, 455 U. S. 331, 341 (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 49 (1980). The second part provides that "the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." Such language mandates that questions of water rights that arise in relation to a federal project are to be determined in accordance with state law. See *California* v. *United States*, 438 U. S. 645 (1978).

The interstate compacts to which appellee refers are agreements among States regarding rights to surface water. See The Council of State Governments, Interstate Compacts and Agencies 25–29, 31–32 (1979). Appellee emphasizes a compact between Nebraska and Colorado involving water rights to the South Platte River, see 44 Stat. (part 2) 195, and a compact among Nebraska, Colorado, and Kansas involving water rights to the Republican River, see 57 Stat. 86.

Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law,[19] they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement,[20] constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "'intent and policy' to sustain state legislation from attack under the Commerce Clause" was "'expressly stated.'" *New England Power Co.* v. *New Hampshire, supra,* at 343 (quoting *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 427 (1946)).[21] Cf. *Merrion* v. *Jicarilla Apache Tribe,* 455 U. S. 130, 155, n. 21 (1982).

---

[19] "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful

The reciprocity requirement of Neb. Rev. Stat. §46–613.01 (1978) violates the Commerce Clause. We leave to the state courts the question whether the invalid portion is severable. The judgment of the Nebraska Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

---

and continued deference to state water law by Congress." *California* v. *United States,* 438 U. S., at 653.

[20] Similarly, this Court has encouraged States to resolve their water disputes through interstate compacts rather than by equitable apportionment adjudication. See *Colorado* v. *Kansas,* 320 U. S. 383, 392 (1943).

[21] See, *e. g., Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408 (1946) (McCarran-Ferguson Act, 59 Stat. 33); *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945) (§ 1606(a) of the Internal Revenue Code, 53 Stat. 1391); *Whitfield* v. *Ohio,* 297 U. S. 431 (1936) (Hawes-Cooper Act, 45 Stat. 1084); *In re Rahrer,* 140 U. S. 545 (1891) (Wilson Act, 26 Stat. 313).

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

The issue presented by this case, and the only issue, is whether the existence of the Commerce Clause of the United States Constitution by itself, in the absence of any action by Congress, invalidates some or all of Neb. Rev. Stat. §46–613.01 (1978), which relates to ground water. But instead of confining its opinion to this question, the Court first quite gratuitously undertakes to answer the question of whether the authority of Congress to regulate interstate commerce, conferred by the same provision of the Constitution, would enable it to legislate with respect to groundwater overdraft in some or all of the States.

That these two questions are quite distinct leaves no room for doubt. Congress may regulate not only the stream of commerce itself, but also activities which affect interstate commerce, including wholly intrastate activities. See, *e. g.*, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942); *United States* v. *Darby*, 312 U. S. 100 (1941); *Houston & Texas R. Co.* v. *United States*, 234 U. S. 342 (1914). The activity upon which the regulatory effect of the congressional statute falls in many of these cases does not directly involve articles of commerce at all. For example, in *Kirschbaum*, the employees were engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate commerce were produced; no one contended that these employees themselves, or the work which they actually performed, dealt with articles of commerce. Nonetheless, the provisions of the Fair Labor Standards Act were applied to them because Congress extended the terms of the Act not only to those who were "engaged in commerce" but also to those who were engaged "in the production of goods for commerce." 316 U. S., at 522.

Thus, the authority of Congress under the power to regulate interstate commerce may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress. Upon a showing that ground-water overdraft has a substantial economic effect on interstate commerce, for example, Congress arguably could regulate ground-water overdraft, even if ground water is not an "article of commerce" itself. See, *e. g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U. S. 264, 281–283 (1981); *id.*, at 310–313 (REHNQUIST, J., concurring in judgment); *Wickard* v. *Filburn*, 317 U. S. 111 (1942). It is therefore wholly unnecessary to decide whether Congress could regulate ground-water overdraft in order to decide this case; since Congress has not undertaken such a regulation, I would leave the determination of its validity until such time as it is necessary to decide that question.

The question actually involved in this case is whether Neb. Rev. Stat. § 46–613.01 (1978) runs afoul of the unexercised authority of Congress to regulate interstate commerce. While the Court apparently agrees that our equitable apportionment decrees in cases such as *Wyoming* v. *Colorado*, 353 U. S. 953 (1957), and the execution and approval of interstate compacts apportioning water have given rise to "the legal expectation that under certain circumstances each State may restrict water within its borders," *ante*, at 956, it insists on an elaborate balancing process in which the State's "interest" is weighed under traditional Commerce Clause analysis.

I think that in more than one of our cases in which a State has invoked our original jurisdiction, the unsoundness of the Court's approach is manifest. For example, in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237 (1907), the Court said:

> "This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."

Five years earlier, in *Kansas* v. *Colorado*, 185 U. S. 125, 142, 145–146 (1902), the Court had made clear that a State's quasi-sovereign interest in the flow of surface and subterranean water within its borders was of the same magnitude as its interest in pure air or healthy forests.

In my view, these cases appropriately recognize the traditional authority of a State over resources within its boundaries which are essential not only to the well-being but often to the very lives of its citizens. In the exercise of this authority, a State may so regulate a natural resource as to preclude that resource from attaining the status of an "article of commerce" for the purposes of the negative impact of the Commerce Clause. It is difficult, if not impossible, to conclude that "commerce" exists in an item that cannot be reduced to possession under state law and in which the State recognizes only a usufructuary right. "Commerce" cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only *used*.

Of course, a State may not discriminate against interstate commerce when it regulates even such a resource. If the State allows indiscriminate intrastate commercial dealings in a particular resource, it may have a difficult task proving that an outright prohibition on interstate commercial dealings is not such a discrimination. I had thought that this was the basis for this Court's decisions in *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979), *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), and *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911). In each case, the State permitted a natural resource to be reduced to private possession, permitted an *intrastate* market to exist in that resource, and either barred *interstate* commerce entirely or granted its residents a commercial preference.[1]

---

[1] Similarly, in *City of Altus* v. *Carr*, 255 F. Supp. 828 (WD Tex.), summarily aff'd, 385 U. S. 35 (1966), Texas placed no restrictions upon the use or the intrastate sale of ground water. The "rule in Texas was that an

By contrast, Nebraska so regulates ground water that it cannot be said that the State permits any "commerce," intrastate or interstate, to exist in this natural resource. As with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in ground water, but grants landowners only a right to *use ground water on the land from which it has been extracted*. Moreover, the landowner's right to use ground water is limited. Nebraska landowners may not extract ground water "in excess of a reasonable and beneficial use upon the land in which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole." *Olson* v. *City of Wahoo*, 124 Neb. 802, 811, 248 N. W. 304, 308 (1933). With the exception of municipal water systems, Nebraska forbids any transportation of ground water off the land owned or controlled by the person who has appropriated the water from its subterranean source. 208 Neb. 703, 710, 305 N. W. 2d 614, 619 (1981). See App. 68–69.

Nebraska places additional restrictions on ground-water users within certain areas, such as the portion of appellants' land situated in Nebraska, where the shortage of ground water is determined to be critical. Water users in appellants' district are permitted only to irrigate the acreage irrigated in 1977, or the average number of acres irrigated between 1972 and 1976, whichever is greater, and must obtain permission from the water district's board before any

---

owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property." 255 F. Supp., at 833, n. 8. Texas' absolute ownership rule is an anomaly among the Western States. See 5 R. Clark, Waters and Water Rights § 441 (1972 and 1978 Supp.). In Nebraska, as in most of the Western States, ground water is not treated as "any other species of property."

additional acreage may be placed under irrigation. The amount of ground water that may be extracted is strictly limited on an acre-inch-per-irrigated-acre basis. There are also detailed regulations as to the spacing of wells and the use and operation of flow meters. *Id.*, at 71–82.

Since Nebraska recognizes only a limited right to use ground water on land owned by the appropriator, it cannot be said that "commerce" in ground water exists as far as Nebraska is concerned. Therefore, it cannot be said that Neb. Rev. Stat. § 46–613.01 (1978) either discriminates against, or "burdens," interstate commerce. Section 46–613.01 is simply a regulation of the landowner's *right to use* ground water extracted from lands he owns within Nebraska.[2] Unlike the Court, I cannot agree that Nebraska's limitation upon a landowner's right to extract water from his land situated in Nebraska *for his own use* on land he owns in an adjoining State runs afoul of Congress' unexercised authority to regulate interstate commerce.[3]

---

[2] Unlike several other Western States, Nebraska does not entirely forbid ground water extracted in Nebraska to be used in other States. See Brief for City of El Paso as *Amicus Curiae* 2, n. 3. As noted by the Court, Nebraska merely places conditions on such a use of the State's ground water. A permit must be obtained from the Nebraska Department of Water Resources. If the requested withdrawal of ground water is determined to be "reasonable, . . . not contrary to the conservation and use of ground water, and . . . not otherwise detrimental to the public welfare," a permit will be issued so long as the "state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska." Neb. Rev. Stat. § 46–613.01 (1978).

[3] The Court today invalidates only the reciprocity provision in § 46–613.01. *Ante*, at 957–958. Appellants, however, have never applied for the permit required by the Nebraska statute. I see nothing in the Court's opinion that would preclude the Nebraska Department of Water Resources from prohibiting appellants from transporting ground water into the Colorado portion of their land until they obtain the permit required by the statute. I also see nothing in the Court's opinion that would preclude the Department of Water Resources from denying appellants a permit because of a failure to satisfy the remaining conditions in the statute.

BOARD OF EDUCATION OF ROGERS, ARKANSAS, ET AL. *v.* McCLUSKEY, BY HIS NEXT FRIEND, McCLUSKEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81–1577. Decided July 2, 1982

Under §§ 9 and 10 of petitioner School Board's rules, the Board has discretion to suspend a high school student for "good cause," which is defined as including "sale, use or possession of alcoholic beverages or illegal drugs." Section 11 of the rules provides for mandatory suspension for the remainder of the semester if a student has on school premises used, sold, or been under the influence or in possession of "narcotics or other hallucinogenics, drugs, or controlled substances" classified as such by an Arkansas statute. That statute specifically exempts alcohol from its coverage of "controlled substances." After a hearing before the Board, respondent, a 10th-grade student, was expelled for the remainder of the semester because he was on school premises while intoxicated. Respondent then sought injunctive relief in Federal District Court under 42 U. S. C. § 1983 (1976 ed., Supp. IV). While there was conflicting evidence concerning which section of its rules the Board had invoked, the Board's Chairman testified that the Board had suspended students under § 11 for alcohol offenses for the past five years. The District Court concluded that as a matter of fact the Board had acted under § 11, that § 11 did not apply to alcohol, and that the Board thus had acted unreasonably and had violated respondent's right to substantive due process, even though the Board had discretion to suspend him under § 10. The Court of Appeals affirmed.

Held: The courts below plainly erred in replacing the Board's construction of § 11 with their own notions under the facts of this case. The Board's interpretation of § 11 is reasonable, since even though alcohol is not a "controlled substance" under § 11, that section also covers "drugs" and alcohol is a "drug." It is reasonable to conclude that § 11 requires suspension for any drug use, including use of alcohol, on school premises, while § 10 permits discretionary suspension for drug use off school premises. In any event, federal courts are not authorized to construe school regulations, *Wood* v. *Strickland*, 420 U. S. 308, and thus the Board's interpretation of its regulations controls.

Certiorari granted; 662 F. 2d 1263, reversed.

PER CURIAM.

Respondent, a 10th-grade student in the Rogers, Ark., School District, left school on October 21, 1980, after the first period without permission, and, with four other students, consumed alcohol and became intoxicated. When he returned to school later that day to go on a band trip, he was notified that he was suspended from school. His parents were notified the next day that their son had been suspended pending a hearing before the Rogers School Board; a hearing was scheduled for October 29. At the hearing before the Board, none of the five students denied that they had been drinking, and the Board voted to expel all five for the remainder of the semester.

Respondent immediately sought injunctive relief under 42 U. S. C. § 1983 (1976 ed., Supp. IV), and the case was heard by the United States District Court for the Western District of Arkansas on December 4. The District Court decided that the School Board had violated respondent's right to substantive due process, and ordered that he be granted credit for the semester during which he was suspended and that all references to his suspension be expunged from his school records.

The District Court's action was based on its interpretation of the School Board's rules and its conclusions concerning which rules the Board invoked in suspending respondent. There is no doubt that the Board had the authority to suspend respondent under §§ 9 and 10 of its written Policies on Pupil Suspension. Section 9 provides that the Board *may* suspend or expel any student "for good cause." Section 10 defines "good cause," and provides that it includes "sale, use or possession of alcoholic beverages or illegal drugs." Thus it was clearly within the Board's discretion to suspend a student for becoming intoxicated.

The District Court decided that the Board had acted under § 11 of its rules, which provides for mandatory suspension when it applies. Section 11 provides:

> "For the protection of other pupils in the school grades 9–12, the school board *shall* expel for the remainder of the semester with loss of credit for the semester's work any pupil whenever it has been established to the satisfaction of the board, or the superintendent, or the principal, or his assistant in charge, that the pupil has on school premises or at school sponsored activities (including trips) used, sold, been under the influence of, or been in possession of narcotics or other hallucinogenics, drugs, or controlled substances classified as such by Act 590 of 1971, as amended."

There was conflicting testimony concerning which section the Board had invoked. The letters sent to respondent's parents informing them of the suspension and the hearing cited both § 10 and § 11. Adams, a Board member and a lawyer, testified that he based his motion to expel McCluskey on § 10 because he had doubts about the applicability of § 11. The Chairman of the Board testified that the Board had suspended students under § 11 for alcohol offenses for the past five years.

The District Court found as a matter of fact that the Board acted under § 11 when it suspended respondent. It then went on to decide that § 11 did not apply to alcohol.* Section 11 applies to "narcotics or other hallucinogenics, drugs, or controlled substances classified as such by Act 590 of 1971, as amended." Act 590, Ark. Stat. Ann. § 82–2602(e) (Supp. 1981), specifically exempts alcohol from its coverage; therefore, alcohol is not a "controlled substance." Nor is it a "narcotic or other hallucinogenic." The District Court also concluded that alcohol is not a "drug." While technically alcohol is a drug, the District Court noted, it is not considered a drug in common parlance. For this reason, the District Court concluded, the Board had acted unreasonably by suspending respondent under § 11. It held that the Board violated substantive due process by suspending him under the mandatory terms of § 11, even though the Board had discretion to suspend him under § 10.

---

*The Board has since amended its regulations so as to remove all question that suspension for the remainder of the semester is mandatory if a student is intoxicated on school premises.

A divided Court of Appeals for the Eighth Circuit affirmed. 662 F. 2d 1263 (1981). It reviewed the District Court's conclusion that the Board acted under § 11 rather than § 10 under the clearly-erroneous standard of Federal Rule of Civil Procedure 52(a), and held that the District Court's conclusion passed muster. It also affirmed the District Court's holding that § 11 cannot reasonably be interpreted to apply to alcohol because "the express terms of section 11 apply only to 'drugs' and expressly exempt alcohol." 662 F. 2d, at 1267. For this reason, the Court of Appeals concluded, *Wood* v. *Strickland*, 420 U. S. 308 (1975), was distinguishable. There this Court had stated that "§ 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations." *Id.*, at 326. Although this Court had plainly stated that federal courts were not authorized to construe school regulations, the Court of Appeals concluded that *Wood* v. *Strickland* was distinguishable because the school board in that case had construed its regulations reasonably while here the Board had construed its regulations unreasonably. 662 F. 2d, at 1267. Judge McMillian dissented because he concluded that *Wood* v. *Strickland* barred federal courts from construing the school regulations involved in this case differently than the Board had construed them.

Wood v. *Strickland* plainly requires that the Court of Appeals be reversed. There high school girls were expelled for "spiking" a punch served at a school meeting by adding two bottles of malt liquor. The malt liquor had an alcoholic content of 3.2% and the alcoholic content of the spiked punch was estimated at 0.91%. 420 U. S., at 326. The Court of Appeals had set aside the girls' expulsions because they had been expelled for adding an alcoholic beverage to the punch, but a state statute defined "intoxicating liquor" as a beverage with an alcoholic content exceeding 5%, and the court thought the 5% rule of the statute should apply to the school regulation. We held that the court erred in substituting its own notions for the school board's definition of its rules:

> "[T]he Court of Appeals was ill advised to supplant the interpretation of the regulation of those officers who adopted it and are entrusted with its enforcement." *Id.*, at 325.

The Court continued, as noted *supra*, by stating that

> "§ 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings *or the proper construction of school regulations*." *Id.*, at 326 (emphasis added).

The Court of Appeals and the District Court plainly erred in distinguishing *Wood* v. *Strickland* on the ground that the Board's interpretation of § 11 in this case was unreasonable while the school board's construction of "alcoholic beverage" in *Wood* v. *Strickland* was reasonable. A case may be hypothesized in which a school board's interpretation of its rules is so extreme as to be a violation of due process, but this is surely not that case. The Board's interpretation of § 11 is reasonable. Contrary to the Court of Appeals, alcohol is not expressly exempted from the coverage of § 11. Section 11 covers "controlled substances classified as such by Act 590," and Act 590 expressly exempts alcohol from its coverage. Therefore, alcohol is not a "controlled substance" under § 11. But § 11 also covers "drugs," and, as the District Court conceded, alcohol is a "drug." Moreover, § 11 mandates suspension of students under the influence of drugs while on school premises. Section 10, which gives the Board discretion to suspend students for drug use, is not limited in its application to drug use on school premises. It is reasonable to conclude that the regulations require suspension for any drug use, including use of alcohol, on school premises, while permitting suspension for drug use off school premises.

In any case, even if the District Court's and the Court of Appeals' views of § 11 struck us as clearly preferable to the Board's—which they do not—the Board's interpretation of its regulations controls under *Wood* v. *Strickland.* The Chairman of the Board testified that the Board had interpreted § 11 as requiring the suspension of students found intoxicated on school grounds for a number of years prior to respondent's suspension, and it is undisputed that the Board had the authority to suspend students for that reason. We conclude that the District Court and the Court of Appeals plainly erred in replacing the Board's construction of § 11 with their own notions under the facts of this case. Accordingly, the petition for certiorari is granted, and the judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

As JUSTICE REHNQUIST has reminded us, in "our zeal to provide 'equal justice under law,' we must never forget that this Court is not a forum for the correction of errors." *Boag* v. *MacDougall*, 454 U. S. 364, 367–368 (1982) (dissenting opinion). "To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."[1] This case illustrates how ineffectively the Court is supervising its discretionary docket.

---

[1] Address of Chief Justice Vinson before the American Bar Association, September 7, 1949 (quoted in R. Stern & E. Gressman, Supreme Court Practice 258 (5th ed. 1978)).

The case is not of sufficient importance to warrant full briefing and argument. It is not worthy of an opinion signed by a Member of this Court. The disposition is explained by an anonymous author writing "*per curiam*"—that is to say, "for the Court." In ever-increasing numbers, appeals throughout the federal system are being decided in this anonymous fashion. It is not uncommon for courts of appeals to issue opinions that are not to be cited as authority in other cases.[2] In one recent published case—which was sufficiently important to induce this Court to grant certiorari even before a conflict in the circuits had developed—the court purported to justify such an ad hoc adjudication by asserting that it lacked "precedential character."[3] The threat to the quality of our work that is presented by the ever-increasing impersonalization and bureaucratization of the federal judicial system is far more serious than is generally recognized. Regrettably the example set by this Court in cases of this kind is not one of resistance, but rather of encouragement, to the rising administrative tide.

We are far too busy to correct every error that we perceive among the thousands of cases that litigants ask us to review. In recent years, when we have exercised our discretionary jurisdiction and issued *per curiam* rulings deciding cases summarily, we have most frequently come to the aid of a prosecutor or a warden who has been rebuffed by another court.[4] Today we exercise our majestic power to enforce a

---

[2] See Reynolds & Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978); Note, Unreported Decisions in the United States Courts of Appeals, 63 Cornell L. Rev. 128 (1977).

[3] *Rowley* v. *Board of Education of Hendrick Hudson Central School District*, 632 F. 2d 945, 948, n. 7 (CA2 1980), rev'd, *ante*, p. 176.

[4] In this Term, see *Duckworth* v. *Serrano*, 454 U. S. 1 (1981); *Jago* v. *Van Curen*, 454 U. S. 14 (1981); *Leeke* v. *Timmerman*, 454 U. S. 83 (1981); *California ex rel. Cooper* v. *Mitchell Brothers' Santa Ana Theater*, 454 U. S. 90 (1981); *Harris* v. *Rivera*, 454 U. S. 339 (1981); *Hutto* v. *Davis*, 454 U. S. 370 (1982); *Wainwright* v. *Torna*, 455 U. S. 586 (1982); *Sumner*

School Board's suspension of a 10th-grade student who consumed too much alcohol on October 21, 1980.

If the student had been unjustly suspended, I wonder if the Court would consider the matter of sufficient national importance to require summary reversal. I doubt it.

I respectfully dissent.

---

v. *Mata* 455 U. S. 591 (1982); *Fletcher* v. *Weir*, 455 U. S. 603 (1982); *United States* v. *Hollywood Motor Car Co.*, *ante*, p. 263; *Michigan* v. *Thomas*, *ante*, p. 259. But see *Boag* v. *MacDougall*, 454 U. S. 364 (1982).

It certainly cannot be said that egregious error is presented only in cases in which prosecutors and wardens seek review. See, *e. g.*, *McKinney* v. *Estelle*, 657 F. 2d 740 (CA5 1981), cert. denied, 456 U. S. 937 (1982); *Tejeda-Mata* v. *INS*, 626 F. 2d 721 (CA9 1980), cert. denied, 456 U. S. 994 (1982).

REPORTER'S NOTE

The next page is purposely numbered 1101. The numbers between 973 and 1101 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 28 THROUGH SEPTEMBER 20, 1982

JUNE 28, 1982

Appeal Dismissed

No. 81–2062. NEW YORK SHIPPING ASSN., INC., ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 55 N. Y. 2d 11, 432 N. E. 2d 578.

Vacated and Remanded on Appeal

No. 81–634. SHARON STEEL CORP. ET AL. *v.* INSURANCE COMMISSIONER OF NEW HAMPSHIRE ET AL. Appeal from Sup. Ct. N. H. Judgment vacated and case remanded for further consideration in light of *Edgar* v. *MITE Corp.*, 457 U. S. 624 (1982). Reported below: 121 N. H. 607, 433 A. 2d 1250.

Certiorari Granted—Reversed and Remanded. (See No. 81–593, *ante*, p. 259; and No. 81–1144, *ante*, p. 263.)

Certiorari Granted—Vacated and Remanded

No. 80–1699. PLANTE, COMMISSIONER OF INSTITUTIONS AND AGENCIES OF NEW JERSEY, ET AL. *v.* SCOTT, BY AND THROUGH HIS GUARDIAN, WEINTRAUB. C. A. 3d Cir. Motion of American Psychiatric Association for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Youngberg* v. *Romeo*, 457 U. S. 307 (1982). Reported below: 641 F. 2d 117.

No. 80–6397. GRAHAM *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Johnson*, 457 U. S. 537 (1982). Reported below: 76 App. Div. 2d 228, 431 N. Y. S. 2d 209.

No. 80–6758. MILLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Johnson*, 457 U. S. 537 (1982). Reported below: 79 App. Div. 2d 1092, 437 N. Y. S. 2d 954.

No. 81–261. MEACHUM ET AL. *v.* LONGVAL. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Goodwin*, 457 U. S. 368 (1982). Reported below: 651 F. 2d 818.

No. 81–835. IRON ARROW HONOR SOCIETY *v.* SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *North Haven Board of Education* v. *Bell*, 456 U. S. 512 (1982). JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN dissent. Reported below: 652 F. 2d 445.

No. 81–1134. ASHCROFT, ATTORNEY GENERAL OF MISSOURI *v.* NATIONAL ORGANIZATION FOR WOMEN, INC. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Nixon* v. *Fitzgerald*, 457 U. S. 731, 741–743 (1982). Reported below: 676 F. 2d 702.

No. 81–1580. SANBORN ET AL. *v.* WOLFEL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). See *Butz* v. *Economou*, 438 U. S. 478, 504 (1978) (deeming it "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [42 U. S. C.] § 1983 and suits brought directly under the Constitution against federal officials"). Reported below: 666 F. 2d 1005.

No. 81–5871. Ford *v.* Kentucky. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Johnson*, 457 U. S. 537 (1982). Reported below: 622 S. W. 2d 915.

No. 81–6225. Gilmore *v.* Pennsylvania. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Johnson*, 457 U. S. 537 (1982). Reported below: 496 Pa. 420, 437 A. 2d 944.

Miscellaneous Orders

No. A–1039. Weigang *v.* Smith, Attorney General (No. 81–6915); and In re Weigang (No. 81–6916). Application for injunction, addressed to Justice Brennan and referred to the Court, denied.

No. A–1041. Monex International Ltd. et al. *v.* Commodity Futures Trading Commission et al. C. A. 6th Cir. Application for stay, addressed to Justice Rehnquist and referred to the Court, denied. Justice Rehnquist took no part in the consideration or decision of this application.

No. A–1075. American Laundry Press Co. et al. *v.* OK NYO Rexrode. D. C. Kan. Application for stay, addressed to Justice Blackmun and referred to the Court, denied.

No. 81–1095. Morris, Warden *v.* Slappy. C. A. 9th Cir. [Certiorari granted, 456 U. S. 904.] Motion of National Legal Aid and Defender Association for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 81–1114. Illinois *v.* Abbott & Associates, Inc., et al. C. A. 7th Cir. [Certiorari granted, 455 U. S. 1015.] Motion of the Solicitor General for divided argument granted.

No. 81–185. SIMOPOULOS *v.* VIRGINIA. Sup. Ct. Va. [Probable jurisdiction noted, 456 U. S. 988];

No. 81–1255. PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL. *v.* ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL. C. A. 8th Cir. [Certiorari granted, 456 U. S. 988]; and

No. 81–1623. ASHCROFT, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* PLANNED PARENTHOOD ASSOCIATION OF KANSAS CITY, MISSOURI, INC., ET AL. C. A. 8th Cir. [Certiorari granted, 456 U. S. 988.] Motions of Legal Defense Fund for Unborn Children for leave to file briefs as *amicus curiae* granted. Motions of Alan Ernest to represent children unborn and born alive denied.

No. 81–746. CITY OF AKRON *v.* AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL.; and

No. 81–1172. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., ET AL. *v.* CITY OF AKRON ET AL. C. A. 6th Cir. [Certiorari granted, 456 U. S. 988.] Motion of Alan Ernest to represent children unborn and born alive denied.

No. 81–1686. WATT, SECRETARY OF THE INTERIOR, ET AL. *v.* WESTERN NUCLEAR, INC. C. A. 10th Cir. [Certiorari granted, 456 U. S. 988.] Motion of the parties to dispense with printing the joint appendix granted.

No. 81–6857. IN RE GUICE. Petition for writ of habeas corpus denied.

No. 81–2156. IN RE HOLLAND ET AL.;

No. 81–6771. IN RE KULWIEC; and

No. 81–6873. IN RE SHABAZZ. Petitions for writs of mandamus denied.

Certiorari Granted

No. 81–469. BUSH *v.* LUCAS. C. A. 5th Cir. Certiorari granted. Reported below: 647 F. 2d 573.

No. 81–1314. W. R. GRACE & CO. *v.* LOCAL UNION 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA. C. A. 5th Cir. Certiorari granted. Reported below: 652 F. 2d 1248.

No. 81–1998. PRICE WATERHOUSE *v.* PANZIRER ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 663 F. 2d 365.

No. 81–1335. DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. *v.* FELDMAN ET AL. C. A. D. C. Cir. Motion of Conference of Chief Justices for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 213 U. S. App. D. C. 119, 661 F. 2d 1295.

No. 81–6633. BEARDEN *v.* GEORGIA. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 161 Ga. App. 640, 288 S. E. 2d 662.

Certiorari Denied

No. 80–1058. HAMPTON ROADS SHIPPING ASSN. ET AL. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 631 F. 2d 282.

No. 80–1501. SULLIVAN ET AL. *v.* FIRST TENNESSEE BANK N. A. MEMPHIS, EXECUTOR, ET AL.; and

No. 80–1528. SMITH ET AL. *v.* FIRST TENNESSEE BANK N. A. MEMPHIS, EXECUTOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 636 F. 2d 1217.

No. 80–6609. WILKERSON *v.* BLACKBURN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 398 So. 2d 536.

No. 81–585. HONDO BOATS, INC. *v.* MCCRAINE ET AL. Sup. Ct. La. Certiorari denied. Reported below: 399 So. 2d 163.

No. 81–806. LORD ET AL. *v.* LOCAL UNION NO. 2088, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 646 F. 2d 1057.

No. 81–1526. FELDMAN *v.* DISTRICT OF COLUMBIA COURT OF APPEALS ET AL.; and

No. 81–1537. HICKEY *v.* DISTRICT OF COLUMBIA COURT OF APPEALS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 213 U. S. App. D. C. 119, 661 F. 2d 1295.

No. 81–1674. ALABAMA *v.* GRADDICK. Sup. Ct. Ala. Certiorari denied. Reported below: 408 So. 2d 548.

No. 81–1689. HUEY *v.* TELEDYNE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 662 F. 2d 621.

No. 81–1803. CITY OF STAMFORD *v.* IEVA ET AL.; and

No. 81–2056. IEVA *v.* CITY OF STAMFORD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 801.

No. 81–1818. CASARI, DIRECTOR OF THE SECTION OF HOSPITAL AND MEDICAL FACILITIES OF THE NEBRASKA DEPARTMENT OF HEALTH, ET AL. *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF LINCOLN. C. A. 8th Cir. Certiorari denied. Reported below: 667 F. 2d 734.

No. 81–1908. RHEAUME *v.* SAFFELL. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 925.

No. 81–1940. ARTHUR YOUNG & CO. *v.* SUMMER ET AL.;

No. 81–2001. RAYMOND, JAMES & ASSOCIATES, INC. *v.* SUMMER ET AL.; and

No. 81–2060. LAND & LEISURE, INC., ET AL. *v.* SUMMER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 664 F. 2d 965.

No. 81–1973. IRWIN *v.* MONTGOMERY COUNTY, MARYLAND, ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 50 Md. App. 742.

No. 81–1980. ARTHUR TREACHER'S FISH & CHIPS, INC., ET AL. *v.* HORSTMYER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 676 F. 2d 686.

No. 81–1989. WILSON *v.* WILSON. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 2d 497.

No. 81–1990. OPPENHEIM ET AL. *v.* MOREAU ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 2d 1300.

No. 81–1993. CAPPS *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 97 N. M. 453, 641 P. 2d 484.

No. 81–2007. DISTRICT COURT IN AND FOR THE SEVENTEENTH JUDICIAL DISTRICT OF COLORADO ET AL. *v.* MARKS ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 643 P. 2d 741.

No. 81–2010. WILDER *v.* GILMAN PAPER CO. C. A. 11th Cir. Certiorari denied. Reported below: 669 F. 2d 735.

No. 81–2011. PANZIRER *v.* WOLF ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 663 F. 2d 365.

No. 81–2013. JOHNSON *v.* JOHNSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1220.

No. 81–2016. RUPPEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 2d 261.

No. 81–2021. FANNON ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 412 So. 2d 475.

No. 81–2024. WIESEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 81–2031. WILLIAMS ENTERPRISES, INC. *v.* BINKLEY CO. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1320.

No. 81–2033. ABC CONTAINERLINE, N.V., ET AL. *v.* KINGSTON SHIPPING CO., INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 667 F. 2d 34.

No. 81–2045. NIEMI *v.* NATIONAL BROADCASTING CO., INC., ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 126 Cal. App. 3d 488, 178 Cal. Rptr. 888.

No. 81–2053. MCGRAW-EDISON CO. *v.* SIKES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 665 F. 2d 731 and 671 F. 2d 150.

No. 81–2063. SCOTT *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 81–2091. WILT ET AL., DBA ROY WILT & SON, ET AL. *v.* AETNA INSURANCE CO. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 412 So. 2d 491.

No. 81–2128. MARINELLO ET AL. *v.* CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 85 App. Div. 2d 663, 445 N. Y. S. 2d 214.

No. 81–2168. ADVANCE ROSS ELECTRONICS CORP. ET AL. *v.* GREEN, TRUSTEE. Ct. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. Reported below: 624 S. W. 2d 316.

No. 81–2172. OPTION ADVISORY SERVICE, INC. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 681 F. 2d 802.

No. 81–2181. ANDREWS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–2204. GOLDFARB ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 671 F. 2d 975.

No. 81–2194. Hood *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 616.

No. 81–5509. Norris *v.* Estelle, Director, Texas Department of Corrections. C. A. 5th Cir. Certiorari denied. Reported below: 652 F. 2d 998.

No. 81–5725. Stevens *v.* New Mexico. Sup. Ct. N. M. Certiorari denied. Reported below: 96 N. M. 627, 633 P. 2d 1225.

No. 81–6093. Thompson *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 93 Ill. App. 3d 995, 418 N. E. 2d 112.

No. 81–6386. Gault *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 665 F. 2d 348.

No. 81–6548. Devine *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 98 Ill. App. 3d 914, 424 N. E. 2d 823.

No. 81–6631. Kelly *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 2d 1224.

No. 81–6654. United States ex rel. Miller *v.* McCarthy, Superintendent, California Men's Colony, et al. C. A. 9th Cir. Certiorari denied. Reported below: 676 F. 2d 711.

No. 81–6666. Perry *v.* Perry. Ct. App. D. C. Certiorari denied.

No. 81–6677. Romano *v.* California. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 81–6679. Wedra *v.* Thomas et al. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 2d 713.

No. 81–6690. Villareal *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81–6688. HOGAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 497 Pa. 447, 441 A. 2d 1223.

No. 81–6691. SUTAIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 672 F. 2d 923.

No. 81–6692. HOWELL *v.* STEFFEY. C. A. 10th Cir. Certiorari denied.

No. 81–6694. GLOVER-EL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 102 Ill. App. 3d 535, 430 N. E. 2d 147.

No. 81–6705. HARRIS *v.* HOUSEWRIGHT, WARDEN, ILLINOIS STATE PENITENTIARY. C. A. 7th Cir. Certiorari denied. Reported below: 676 F. 2d 700.

No. 81–6732. REYNOLDS *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 81–6743. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 81–6752. JACKSON *v.* LEEKE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1311.

No. 81–6755. MILLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 664 F. 2d 860.

No. 81–6765. OLSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 670 F. 2d 185.

No. 81–6769. INGRAM *v.* SMITH, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 2d 178.

No. 81–6780. STINE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 675 F. 2d 69.

No. 81–6783. POPE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81–6797. ADAMS ET AL. *v.* HOWERTON, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1036.

No. 81–6803. SNYDER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 668 F. 2d 686.

No. 81–6804. NEBEKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 81–6806. RICE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 681 F. 2d 810.

No. 81–6810. TROY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 2d 1340.

No. 81–6825. QUIROS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 2d 427.

No. 81–6845. COMBS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 672 F. 2d 574.

No. 81–6862. TATUM *v.* BURLINGTON NORTHERN RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 676 F. 2d 706.

No. 81–879. UNITED STATES *v.* GILLESPIE. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 650 F. 2d 127.

No. 81–1875. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER *v.* SPIVEY. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 661 F. 2d 464.

No. 81–2048. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* MOORE. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 670 F. 2d 56.

No. 81-2041. SPENCER, DBA J&M DESIGN CO., ET AL. *v.* AMERICAN CONSULTING ASSN., INC. App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 100 Ill. App. 3d 917, 427 N. E. 2d 579.

No. 81-2097. MARISCAL, AS NEXT FRIEND OF MARISCAL *v.* JOHNSON, EXECUTOR. Ct. Civ. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 620 S. W. 2d 905.

No. 81-5783. FRAZIER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 185 Conn. 211, 440 A. 2d 916.

No. 81-6340. DAWSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 84 App. Div. 2d 957, 444 N. Y. S. 2d 333.

No. 81-6629. ETLIN *v.* ROBB, GOVERNOR OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 673 F. 2d 1309.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

This case arises from a child custody dispute between private parties. A Virginia trial court awarded petitioner's ex-wife custody of their 3-year-old son and ordered petitioner to pay child support. Petitioner then brought this action under 42 U. S. C. § 1983 against the trial judge, the State Governor, and the State Attorney General. His complaint sought monetary, injunctive, and declaratory relief, premised on allegations that the custody and support award violated the First, Fifth, Thirteenth, and Fourteenth Amendments. The District Court dismissed the suit without prejudice because the constitutional questions could be addressed in the state-court custody action.

The Court of Appeals for the Fourth Circuit affirmed. 673 F. 2d 1309 (1981). In a brief *per curiam* opinion, the court explained:

> "Under Virginia law, child custody determinations and support orders may be subject to modification at any time. *See* Va. Code Ann. § 16.1–242 (1981 Cum. Supp.); § 20–108 (1975 Repl. Vol.); § 31–17 (1979 Repl. Vol.). Because custody proceedings are considered ongoing proceedings in Virginia, they afford a disappointed litigant, such as [petitioner], an adequate opportunity to present his constitutional claims. *Younger v. Harris*, 401 U. S. 37, 49 (1971). *See Juidice v. Vail*, 430 U. S. 327, 337 (1977). Therefore, it is clear that the doctrine of abstention applies in this instance. *See Moore v. Sims*, 442 U. S. 415 (1979)." App. to Pet. for Cert. A–2.

Petitioner now seeks a writ of certiorari, and presents, as his fourth question, the question of whether the Court of Appeals has properly applied the *Younger* doctrine.[1]

This question is not easily answered because the Fourth Circuit has, in at least two respects, gone beyond our cases in dismissing the action under *Younger* v. *Harris*, 401 U. S. 37 (1971). First, this Court has never applied the *Younger* doctrine to a case where the State was not a party to the pending state proceedings. *Younger* and its early progeny were criminal proceedings, in which, of course, the State is always a party. In *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975), the initial application of *Younger* to a civil proceeding, the Court relied heavily on the State's direct participation.

> "*Younger*, however, also rests upon the traditional reluctance of courts of equity, even within a unitary system,

---

[1] I agree that review of the three other questions presented in the petition, concerning the merits of his cause and the absence of an automatic right of appeal, is unwarranted.

> to interfere with a criminal prosecution. Strictly speaking, this element of *Younger* is not available to mandate federal restraint in civil cases. But whatever may be the weight attached to this factor in civil litigation involving private parties, we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes . . . ." 420 U. S., at 604.

Accordingly, subsequent extensions of *Younger* in the civil context have occurred only when the State was directly involved in a pending state proceeding.[2] The Fourth Circuit's invocation of *Younger* in this case, a "civil litigation involving private parties," represents a substantial broadening of the doctrine.

Second, the Court of Appeals held that deference was justified despite the fact that there were no ongoing or pending state proceedings in the usual sense. Dismissal of the federal action was deemed appropriate because child custody orders in Virginia are subject to modification at any time and petitioner could follow that avenue in order to raise his constitutional claims. It is clear that, under the Court of Appeals' reasoning, custody proceedings would never be final and petitioner would be forced to attempt to reopen state proceedings before receiving a hearing in federal court on any constitutional grounds. None of our *Younger* decisions contemplates this result, which, in effect, imposes an exhaustion requirement upon petitioner before he may bring a § 1983 suit in federal court. Assertion of a federal claim under § 1983, as a general matter, need not be preceded by an attempt to vindicate that claim in state court. *McNeese* v. *Board of Education*, 373 U. S. 668, 672 (1963). Although there are recognized exceptions when "strands of local law are woven into the case" whose resolution should precede consideration by a federal court, *id.*, at 673, this is not suggested to be such a case. Moreover, if it were, the District Court should refrain temporarily from exercising its jurisdiction, but should not dismiss the case outright. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941).

---

[2] See *Juidice* v. *Vail*, 430 U. S. 327 (1977) (civil contempt proceedings); *Trainor* v. *Hernandez*, 431 U. S. 434 (1977) (state civil enforcement action brought by state officials seeking return of fraudulently obtained welfare benefits); *Moore* v. *Sims*, 442 U. S. 415 (1979) (civil proceeding brought by state officials to seize custody of abused children); *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U. S. 423 (1982) (attorney disciplinary proceedings).

A case of this type has not previously been thought to fall within the reach of the *Younger* doctrine. Obviously, the extension of *Younger* to pending civil suits between private litigants where the State is not a party is an issue requiring ultimate resolution by this Court. Indeed, the applicability of *Younger* to all civil litigation is a question that has expressly been reserved for another day on no less than four occasions. *Moore* v. *Sims*, 442 U. S. 415, 423, n. 8 (1979); *Trainor* v. *Hernandez*, 431 U. S. 434, 445, n. 8 (1977); *Juidice* v. *Vail*, 430 U. S. 327, 336, n. 13 (1977); *Huffman* v. *Pursue, Ltd.*, *supra*, at 607. Now that the day has arrived with the decision of the Fourth Circuit, I would grant certiorari.

No. 81–6657. BAKER *v.* ZANT. Super. Ct. Ga., Butts County. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 79-6584. IN RE TRAPP ET AL., 456 U. S. 967;

No. 81-155. BOARD OF TRUSTEES OF INSTITUTIONS OF HIGHER EDUCATION ET AL. *v.* MISSISSIPPI COUNCIL ON HUMAN RELATIONS ET AL., 456 U. S. 971;

No. 81-1796. COWARD *v.* UNITED STATES, 456 U. S. 946;

No. 81-1814. LAKE CARRIERS' ASSN. ET AL. *v.* KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL., 456 U. S. 985;

No. 81-5379. SIRECI *v.* FLORIDA, 456 U. S. 984;

No. 81-5562. GILREATH *v.* GEORGIA, 456 U. S. 984;

No. 81-5944. MESSER *v.* FLORIDA, 456 U. S. 984;

No. 81-6285. MATHIS *v.* UNITED STATES, 456 U. S. 992;

No. 81-6371. WADE *v.* UNITED STATES, 456 U. S. 934;

No. 81-6393. AHMED *v.* EIKERENKOETTER, 456 U. S. 979;

No. 81-6440. PASCHAL *v.* FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY, DIVISION OF EMPLOYMENT SECURITY, ET AL., 456 U. S. 981;

No. 81-6466. WRIGHT *v.* LEIGHTON, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, 456 U. S. 992;

No. 81-6482. CHANEY *v.* WARDEN, MARYLAND PENITENTIARY, 456 U. S. 993;

No. 81-6495. THOMPSON *v.* MORROW ET AL., 456 U. S. 993;

No. 81-6564. COOK *v.* UNITED STATES, 456 U. S. 982;

No. 81-6599. MONTGOMERY *v.* UNITED STATES, 456 U. S. 994; and

No. 81-6667. CAMPBELL *v.* CIVILETTI ET AL., 457 U. S. 1110. Petitions for rehearing denied.

No. 80-1765. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. *v.* HYDROLEVEL CORP., 456 U. S. 556. Motion of American Association of Engineering Societies, Inc., for leave to file a brief as *amicus curiae* denied. Petition for rehearing denied.

No. 79–5932. DOE ET AL. *v.* DELAWARE, 450 U. S. 382 and 451 U. S. 964. Motion for leave to file second petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Stewart (retired) to perform judicial duties in the United States Court of Appeals for the Ninth Circuit for the period September 13, 1982, to September 17, 1982, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JULY 2, 1982

Vacated and Remanded on Appeal

No. 81–922. PAN AMERICAN SAVINGS & LOAN ASSN. ET AL. *v.* PANKO ET AL. Appeal from Ct. App. Cal., 1st App. Dist. Judgment vacated and case remanded for further consideration in light of *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta, ante,* p. 141. Reported below: 119 Cal. App. 3d 916, 174 Cal. Rptr. 240.

No. 81–992. GLENDALE FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* HEHIR ET UX.; and

No. 81–993. CALIFORNIA FEDERAL SAVINGS & LOAN ASSN. *v.* TAN ET AL.; and CALIFORNIA FEDERAL SAVINGS & LOAN ASSN. *v.* ROMAGNOLI ET AL. Appeals from Ct. App. Cal., 4th App. Dist. Judgments vacated and cases remanded for further consideration in light of *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta, ante,* p. 141.

No. 81–1139. GLENDALE FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* GROSS ET AL. Appeal from Ct. App. Cal., 4th App. Dist. Judgment vacated and case remanded for further consideration in light of *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta, ante,* p. 141.

Certiorari Granted—Vacated and Remanded

No. 80–1888. Chastain et al. *v.* Davis. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lehman* v. *Lycoming County Children's Services Agency, ante,* p. 502. Reported below: 640 F. 2d 599.

No. 81–471. United States *v.* Marquez-Amaya. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Valenzuela-Bernal, ante,* p. 858. Reported below: 647 F. 2d 173.

No. 81–596. Springdale School District No. 50 of Washington County *v.* Grace et al. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Board of Education of Hendrick Hudson Central School District* v. *Rowley, ante,* p. 176. Reported below: 656 F. 2d 300.

No. 81–774. Moore *v.* Black Panther Party et al.; and

No. 81–1511. Smith, Attorney General, et al. *v.* Black Panther Party et al. C. A. D. C. Cir. Certiorari granted, judgment vacated, and cases remanded to the Court of Appeals with directions that it instruct the United States District Court for the District of Columbia to dismiss the complaint with prejudice. Justice Marshall would deny the petitions for writs of certiorari. Justice Powell and Justice Stevens took no part in the consideration or decision of these cases. Reported below: 213 U. S. App. D. C. 67, 661 F. 2d 1243.

No. 81–1860. J. P. Stevens & Co., Inc. *v.* National Labor Relations Board et al. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Summit Valley Industries, Inc.* v. *Carpenters,* 456 U. S. 717 (1982). Reported below: 668 F. 2d 767.

No. 81–5534. RENNIE ET AL. *v.* KLEIN, COMMISSIONER, DEPARTMENT OF HUMAN SERVICES, ET AL. C. A. 3d Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Youngberg* v. *Romeo*, 457 U. S. 307 (1982). Reported below: 653 F. 2d 836.

Certiorari Granted—Reversed. (See No. 81–1577, *ante*, p. 966.)

Miscellaneous Orders

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL. Motion for issuance of a restraining order denied without prejudice. JUSTICE BRENNAN took no part in the consideration or decision of this motion. [For earlier decision herein, see 457 U. S. 164.]

No. 92, Orig. ARKANSAS *v.* MISSISSIPPI. It is ordered that Justice Paul C. Reardon (retired) of Boston, Mass., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his technical, stenographic, clerical, and legal assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein. [For earlier order herein, see 456 U. S. 912.]

No. 80–1832. IMMIGRATION AND NATURALIZATION SERVICE *v.* CHADHA ET AL. C. A. 9th Cir. [Probable jurisdiction postponed, 454 U. S. 812];

No. 80–2170. UNITED STATES HOUSE OF REPRESENTATIVES *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812]; and

No. 80–2171. UNITED STATES SENATE *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 812.] Cases restored to calendar for reargument. JUSTICE BRENNAN and JUSTICE BLACKMUN dissent.

No. 81–1774. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* BULLARD. C. A. 5th Cir. [Certiorari granted, 457 U. S. 1116.] Motion for appointment of counsel granted, and it is ordered that Kenneth E. Houp, Jr., Esquire, of Austin, Tex., be appointed to serve as counsel for respondent in this case. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

Certiorari Granted

No. 81–1675. KUSH ET AL. *v.* RUTLEDGE. C. A. 9th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 660 F. 2d 1345.

No. 81–2150. JIM MCNEFF, INC. *v.* TODD ET AL. C. A. 9th Cir. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 667 F. 2d 800.

Certiorari Denied

No. 80–1906. ALLIED INTERNATIONAL, INC. *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 640 F. 2d 1368.

No. 81-1192. GLENDALE FEDERAL SAVINGS & LOAN ASSN. ET AL. *v.* FOX ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 2d 1078.

No. 81-1290. SCANLON, SECRETARY OF EDUCATION OF PENNSYLVANIA, ET AL. *v.* TOKARCIK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 665 F. 2d 443.

No. 81-1503. CALIFORNIA *v.* GLENDALE FEDERAL SAVINGS & LOAN ASSN. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 81-1744. FEDERAL HOME LOAN BANK BOARD *v.* GULF FEDERAL SAVINGS & LOAN ASSOCIATION OF JEFFERSON PARISH. C. A. 11th Cir. Certiorari denied. Reported below: 651 F. 2d 259.

No. 81-361. BRAMKAMP ET AL. *v.* PUERTO RICO EX REL. BAREZ, SECRETARY OF LABOR AND HUMAN RESOURCES. C. A. 2d Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 654 F. 2d 212.

No. 81-465. PORTER ET AL. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 659 F. 2d 306.

No. 81-1047. UNITED STATES *v.* SHER. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 657 F. 2d 28 and 661 F. 2d 34.

No. 81-1692. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* VON BURLESON. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 666 F. 2d 231.

No. 81–1548. VASQUEZ *v.* MCALLEN BAG & SUPPLY CO. C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 660 F. 2d 686.

No. 81–1895. BRONZE SHIELDS, INC., ET AL. *v.* NEW JERSEY DEPARTMENT OF CIVIL SERVICE ET AL.; and HOWARD ET AL. *v.* NEW JERSEY DEPARTMENT OF CIVIL SERVICE ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 667 F. 2d 1074 (first case); 667 F. 2d 1099 (second case).

No. 81–5578. BREWER *v.* INDIANA. Sup. Ct. Ind.;

No. 81–5731. HYMAN *v.* SOUTH CAROLINA. Sup. Ct. S. C.; and

No. 81–6606. FRANCOIS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 81–5578, —— Ind. ——, 417 N. E. 2d 889; No. 81–5731, 276 S. C. 559, 281 S. E. 2d 209; No. 81–6606, 407 So. 2d 885.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

JULY 6, 1982

Miscellaneous Order

No. 92, Orig. ARKANSAS *v.* MISSISSIPPI. Motion for leave to file a counterclaim referred to the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 1119.]

AUGUST 5, 1982

Dismissal Under Rule 53

No. 81–1888. MORGAN DRIVE AWAY, INC., ET AL. *v.* SAMFORD ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 665 F. 2d 598.

AUGUST 10, 1982

Miscellaneous Order

No. A–147. MITCHELL, WARDEN, ET AL. *v.* LAWRENCE, NEXT FRIEND ACTING ON BEHALF OF COPPOLA. This matter came on before THE CHIEF JUSTICE as Circuit Justice for the Fourth Circuit on the application of James P. Mitchell, Warden, and Gerald L. Baliles, Attorney General of Virginia, and was referred by him to the Court. There being only four Members of the Court available in Washington, a conference call was arranged to include those outside Washington except JUSTICE O'CONNOR who was outside the United States. After consideration of the matters presented by the application, the application is granted and the stay entered by Circuit Judge John D. Butzner, Jr., of the United States Court of Appeals for the Fourth Circuit is hereby vacated. JUSTICE BRENNAN and JUSTICE MARSHALL would deny the application. JUSTICE STEVENS would call for a response from J. Gray Lawrence, Jr., the respondent above named. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

AUGUST 12, 1982

Dismissal Under Rule 53

No. 81–2333. ANDERSON ET AL. *v.* FLATEAU ET AL. Appeal from D. C. S. D. N. Y. dismissed under this Court's Rule 53. Reported below: 537 F. Supp. 257.

AUGUST 19, 1982

Dismissal Under Rule 53

No. 81–1810. NARANJO ET AL. *v.* CORRIZ. C. A. 10th Cir. [Certiorari granted, 456 U. S. 971.] Stipulation to dismiss the writ of certiorari was filed, and the case was dismissed pursuant to this Court's Rule 53.

Miscellaneous Order

No. A-169. KALLENBERGER *v.* BUCHANAN, SECRETARY OF STATE OF COLORADO. Application for injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied. JUSTICE BLACKMUN would grant the application. JUSTICE MARSHALL would defer consideration of the application pending the filing of a response by the respondent. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

AUGUST 24, 1982

Dismissal Under Rule 53

No. 82-75. HORIZONS APARTMENTS ASSOCIATES, LTD., ET AL. *v.* LEE COUNTY, FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari dismissed under this Court's Rule 53. Reported below: 415 So. 2d 1373.

SEPTEMBER 7, 1982

Dismissal Under Rule 53

No. 81-1685. LIMMER ET AL. *v.* FERNANDES, AKA SANTANI. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 663 F. 2d 619.

SEPTEMBER 9, 1982

Miscellaneous Orders

No. A-958. MCDONALD *v.* ALEXANDER, GOVERNOR OF TENNESSEE, ET AL. Application for injunction, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A-1138. PFISTER *v.* DELTA AIR LINES, INC., ET AL. C. A. D. C. Cir. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A-22. HALE *v.* UNITED STATES. C. A. 10th Cir. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–45 (82–78). CALIFORNIA *v.* SHIRLEY. Application for stay of enforcement of the judgment of the Supreme Court of California, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–102 (82–157). SMITH *v.* OLSON, REGISTRAR OF VOTERS, ORANGE COUNTY, CALIFORNIA, ET AL. Application for injunction, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–103 (82–274). PENNSYLVANIA ET AL. *v.* DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR ET AL. C. A. 3d Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D–266. IN RE DISBARMENT OF FELDMAN. Disbarment entered. [For earlier order herein, see 456 U. S. 956.]

No. D–271. IN RE DISBARMENT OF WAJERT. Disbarment entered. [For earlier order herein, see 456 U. S. 957.]

No. D–272. IN RE DISBARMENT OF LANGKAM. Disbarment entered. [For earlier order herein, see 456 U. S. 957.]

No. D–277. IN RE DISBARMENT OF BOEHM. Disbarment entered. [For earlier order herein, see 457 U. S. 1103.]

No. D–278. IN RE DISBARMENT OF PAGLIANITE. It is ordered that Frank A. Paglianite, of Pittston, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–279. IN RE DISBARMENT OF RESNICK. It is ordered that David Resnick, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-261. IN RE DISBARMENT OF HAMMERSMITH. Disbarment entered. [For earlier order herein, see 456 U. S. 902.]

No. D-280. IN RE DISBARMENT OF STERN. It is ordered that Julius Stern, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-281. IN RE DISBARMENT OF SANDS. It is ordered that Ira Jay Sands, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-282. IN RE DISBARMENT OF LEVINE. It is ordered that Michael Levine, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-283. IN RE DISBARMENT OF NADEL. It is ordered that Arthur G. Nadel, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-284. IN RE DISBARMENT OF FISHMAN. It is ordered that Gregg Lewis Fishman, of Forest Hills, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-285. In re Disbarment of Gloeckner. It is ordered that George N. Gloeckner, of Columbus, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-286. In re Disbarment of Nadler. It is ordered that Floyd Norman Nadler, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-287. In re Disbarment of Bonds. It is ordered that Rodney S. Bonds, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-288. In re Disbarment of Lieberman. It is ordered that Sidney Z. Lieberman, of McLean, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-289. In re Disbarment of Brisbois. It is ordered that James A. Brisbois, of Saginaw, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 81-430. Illinois *v.* Gates et ux. Sup. Ct. Ill. [Certiorari granted, 454 U. S. 1140.] Motion of respondents for divided argument denied.

No. D-290. IN RE DISBARMENT OF SPIRO. It is ordered that Demetri M. Spiro, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-291. IN RE DISBARMENT OF SUNDOCK. It is ordered that Michael A. Sundock, of Opelika, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-292. IN RE DISBARMENT OF FENDLER. It is ordered that Robert Harold Fendler, of Beverly Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 80-1640. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* SHOLLY ET AL.; and

No. 80-1656. METROPOLITAN EDISON CO. ET AL. *v.* PEOPLE AGAINST NUCLEAR ENERGY ET AL. C. A. D. C. Cir. [Certiorari granted, 451 U. S. 1016.] Motion of respondents for further deferral of oral argument granted.

No. 81-185. SIMOPOULOS *v.* VIRGINIA. Sup. Ct. Va. [Probable jurisdiction noted, 456 U. S. 988.] Motions of National Organization for Women et al., Committee for Abortion Rights and Against Sterilization Abuse et al., and Certain Law Professors for leave to file briefs as *amici curiae* granted.

No. 81-334. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. *v.* CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL. C. A. 9th Cir. [Certiorari granted, 454 U. S. 1141.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a supplemental brief as *amicus curiae* granted.

No. 81–523. CONTAINER CORPORATION OF AMERICA *v.* FRANCHISE TAX BOARD. Ct. App. Cal., 1st App. Dist. [Probable jurisdiction noted, 456 U. S. 960.] Motions of Union of Industries of the European Community and Committee on Unitary Tax for leave to file briefs as *amici curiae* granted. Motion of Committee on State Taxation of the Council of State Chambers of Commerce for leave to participate in oral argument as *amicus curiae* and for additional time for argument denied. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 81–680. HERMAN & MACLEAN *v.* HUDDLESTON ET AL.; and

No. 81–1076. HUDDLESTON ET AL. *v.* HERMAN & MACLEAN ET AL. C. A. 5th Cir. [Certiorari granted, 456 U. S. 914.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 81–773. NORTH DAKOTA *v.* UNITED STATES. C. A. 8th Cir. [Probable jurisdiction noted, 455 U. S. 987.] Motion of National Wildlife Federation et al. for leave to file a brief as *amici curiae* granted.

No. 81–897. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *v.* PERINI NORTH RIVER ASSOCIATES ET AL. C. A. 2d Cir. [Certiorari granted, 455 U. S. 937.] Motion of the Solicitor General for divided argument denied. Motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument *pro hac vice* granted.

No. 81–1003. WHITE, MAYOR OF BOSTON, ET AL. *v.* MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS, INC., ET AL. Sup. Jud. Ct. Mass. [Certiorari granted, 455 U. S. 919.] Motion of American Federation of Labor and Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* granted.

No. 81–1251. CONNICK, DISTRICT ATTORNEY IN AND FOR THE PARISH OF ORLEANS, LOUISIANA *v.* MYERS. C. A. 5th Cir. [Certiorari granted, 455 U. S. 999.] Motions of National Education Association et al. and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* granted.

No. 81–1489. XEROX CORP. *v.* COUNTY OF HARRIS, TEXAS, ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. [Probable jurisdiction noted, 456 U. S. 913.] Motion of International Association of Assessing Officers for leave to file a brief as *amicus curiae* granted.

No. 81–1493. GILLETTE CO. *v.* MINER. Sup. Ct. Ill. [Certiorari granted, 456 U. S. 914.] Motions of Public Citizen and Consumer Coalition for leave to file briefs as *amici curiae* granted.

No. 81–1506. FEDERAL ELECTION COMMISSION ET AL. *v.* NATIONAL RIGHT TO WORK COMMITTEE ET AL. C. A. D. C. Cir. [Certiorari granted, 456 U. S. 914.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 81–1578. KRAMARSKY, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, ET AL. *v.* DELTA AIR LINES, INC., ET AL.; KRAMARSKY, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS *v.* BURROUGHS CORP.; and KRAMARSKY, COMMISSIONER, NEW YORK STATE DIVISION OF HUMAN RIGHTS, ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 2d Cir. [Probable jurisdiction noted, 456 U. S. 924.] Motion of American Federation of Labor and Congress of Industrial Organizations et al. for leave to file a brief as *amici curiae* granted. Motion of appellants Kramarsky et al. for divided argument and for leave to file separate brief and joint appendix denied.

No. 81–1613. MEMPHIS BANK & TRUST CO. *v.* GARNER, SHELBY COUNTY TRUSTEE, ET AL. Sup. Ct. Tenn. [Probable jurisdiction noted, 456 U. S. 943.] Motions of Capital Preservation Fund, Inc., et al. and Farm Credit Banks for leave to file briefs as *amici curiae* granted.

No. 81–1627. SHEPARD *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. [Certiorari granted, 456 U. S. 970.] Motion of the Solicitor General for divided argument and for additional time for oral argument denied.

Rehearing Denied

No. 88, Orig. CALIFORNIA *v.* TEXAS ET AL., 457 U. S. 164;

No. 89, Orig. CALIFORNIA EX REL. STATE LANDS COMMISSION *v.* UNITED STATES, 457 U. S. 273;

No. 80–108. FIRST PENNSYLVANIA BANK N.A. *v.* ZEFFIRO ET AL., 456 U. S. 1005;

No. 80–1538. PLYLER, SUPERINTENDENT, TYLER INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* DOE, GUARDIAN, ET AL., 457 U. S. 202;

No. 80–1934. TEXAS ET AL. *v.* CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN ET AL., 457 U. S. 202;

No. 80–1749. FEDERAL ENERGY REGULATORY COMMISSION ET AL. *v.* MISSISSIPPI ET AL., 456 U. S. 742;

No. 80–2138. CARTER *v.* DAYTON BOARD OF EDUCATION ET AL., 456 U. S. 989;

No. 80–6609. WILKERSON *v.* BLACKBURN, WARDEN, *ante*, p. 1105;

No. 81–451. HATHORN ET AL. *v.* LOVORN ET AL., 457 U. S. 255; and

No. 81–912. CLICK ET AL. *v.* IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL., 457 U. S. 1116. Petitions for rehearing denied.

No. 81–1478. HARVEY ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL., 457 U. S. 1105.

No. 81–1525. THOMPSON *v.* WOLTENBERG, 456 U. S. 1006;

No. 81–1534. NIEVES *v.* UNITED STATES, 457 U. S. 1117;

No. 81–1577. BOARD OF EDUCATION OF ROGERS, ARKANSAS, ET AL. *v.* MCCLUSKEY, BY HIS NEXT FRIEND, MCCLUSKEY, *ante*, p. 966;

No. 81–1589. HUNT *v.* COLLINS, 457 U. S. 1127;

No. 81–1665. DYKEMA ET AL. *v.* UNITED STATES ET AL., 456 U. S. 983;

No. 81–1822. FIALA *v.* VILLAGE OF CARPENTERSVILLE, 456 U. S. 990;

No. 81–2009. YEO *v.* MICHIGAN, 457 U. S. 1134;

No. 81–2016. RUPPEL *v.* UNITED STATES, *ante*, p. 1107;

No. 81–2018. BERGER *v.* UNITED STATES ET AL., 457 U. S. 1120;

No. 81–2045. NIEMI *v.* NATIONAL BROADCASTING CO., INC., ET AL., *ante*, p. 1108;

No. 81–5578. BREWER *v.* INDIANA, *ante*, p. 1122;

No. 81–5731. HYMAN *v.* SOUTH CAROLINA, *ante*, p. 1122;

No. 81–6528. MASELLI *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA, 457 U. S. 1108;

No. 81–6546. PASCHAL *v.* FLORIDA PUBLIC EMPLOYEES RELATIONS COMMISSION ET AL., 457 U. S. 1109;

No. 81–6559. BLACK *v.* EAST OHIO GAS CO. ET AL., 457 U. S. 1109;

No. 81–6573. HARRINGTON *v.* TENNESSEE, 457 U. S. 1110;

No. 81–6630. HOOVER *v.* MISSISSIPPI, 457 U. S. 1137;

No. 81–6645. RITTER *v.* RITTER, 457 U. S. 1138;

No. 81–6652. NEUSTEIN *v.* UNITED STATES, 457 U. S. 1124; and

No. 81–6654. UNITED STATES EX REL. MILLER *v.* MCCARTHY, SUPERINTENDENT, CALIFORNIA MEN'S COLONY, ET AL., *ante*, p. 1109. Petitions for rehearing denied.

No. 81–6673. OCCHINO *v.* NORTHWESTERN BELL TELEPHONE CO. ET AL., 457 U. S. 1139;

No. 81–6685. WILLIAMS *v.* PEPSI-COLA BOTTLING COMPANY OF ST. LOUIS, MISSOURI, ET AL., 457 U. S. 1139;

No. 81–6691. SUTAIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 1110;

No. 81–6715. IN RE CAMPBELL, 457 U. S. 1116; and

No. 81–6771. IN RE KULWIEC, *ante*, p. 1104. Petitions for rehearing denied.

No. 80–1290. CLEMENTS, GOVERNOR OF TEXAS, ET AL. *v.* FASHING ET AL., 457 U. S. 957. Petition for rehearing and/or clarification denied.

No. 80–6045. KREMER *v.* CHEMICAL CONSTRUCTION CORP., 456 U. S. 461. Motion for leave to file petition for rehearing denied.

SEPTEMBER 20, 1982

Dismissal Under Rule 53

No. 81–2284. BUTCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 676 F. 2d 713.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1133 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

WHITE *v.* FLORIDA

ON APPLICATION FOR STAY

No. A-130. Decided August 13, 1982

An application to stay the judgment and mandate of the Florida Supreme Court, pending filing and disposition of certiorari, is denied. The judgment upheld applicant's conviction for first-degree murder and his death sentence. Although the application establishes that applicant may suffer irreparable harm in the future, there is no indication that the harm is imminent. No execution date has been set, and the State does not contemplate that one will be set in the near future. The application also does not specify the issues for which certiorari will be sought or the reasons why review is appropriate. Absent such a specification, it cannot be determined whether there is a reasonable probability that four Members of the Court would find that this case merits review.

JUSTICE POWELL, Circuit Justice.

William White has requested me as Circuit Justice to stay the judgment and mandate of the Supreme Court of Florida pending filing and disposition of his petition for a writ of certiorari. A state trial court convicted White of first-degree murder and sentenced him to death. The Florida Supreme Court upheld both the conviction and sentence. 415 So. 2d 719 (1982). It denied rehearing on July 8, 1982, and stayed the mandate until August 9, 1982, requiring White to seek any further stay from this Court.

In his application for a stay, filed by counsel, White states that he intends to file a petition for a writ of certiorari because the judgment affirming his conviction and sentence is "in violation of [the] rights secured by the Constitution of the United States." His application does not suggest any more specific basis for seeking the writ. The only reason advanced by White for staying the mandate is that, absent a stay, administrative proceedings culminating in the execution of his sentence will be instituted on August 9. The State has responded, however, that the threat of execution is not imminent. No execution date has been set, and the State does not contemplate that one will be set in the near future.

The standards for granting a stay of mandate pending disposition of a petition for certiorari are well established:

> "[T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *Times-Picayune Publishing Corp.* v. *Schulingkamp*, 419 U. S. 1301, 1305 (1974) (POWELL, J., in chambers).

See *Karcher* v. *Daggett*, 455 U. S. 1303 (1982) (BRENNAN, J., in chambers); *Whalen* v. *Roe*, 423 U. S. 1313, 1316–1317 (1975) (MARSHALL, J., in chambers). Although White's application establishes that he may suffer irreparable harm at some point in the future, there is no indication that the harm is imminent. Additionally, White's application does not specify either the issues for which certiorari will be sought or the reasons why review is appropriate. In the absence of such information, I am unable to determine whether there is a reasonable probability that four Members of the Court would find that this case merits review. Because there is no threat of imminent harm and no basis for determining whether certiorari would be granted, the request for a stay is denied.

BELTRAN *v.* SMITH ET AL.

ON APPLICATION FOR STAY

No. A-208. Decided August 26, 1982

An application to stay, pending appeal to the Court of Appeals, the District Court's judgment denying a preliminary injunction to prohibit federal officials from transferring applicant from one federal detention facility to another is denied. Applicant had been convicted of state offenses but was cooperating with state and federal authorities by testifying in pending prosecutions, and was in federal custody in the witness protection program. Although applicant may be correct in his assertion that the risk to his safety will be increased if he is moved, there is no indication that the officials responsible for the witness protection program will not continue to provide him with protection under that program. In light of the conclusions of the District Court and the Court of Appeals, which denied an injunction pending appeal and a stay pending application to this Court, that any increased risk to applicant does not rise to the level of irreparable injury, his claims are insufficient to justify interference with the Attorney General's discretion to run the prison system and to transfer applicant.

JUSTICE REHNQUIST, Circuit Justice.

Applicant Arturo Beltran, a former member of the Nuestra Familia criminal organization, is currently incarcerated in the Metropolitan Correction Center in San Diego on the basis of several criminal convictions in state courts. Because Beltran is cooperating with state and federal authorities by testifying in pending prosecutions, and because federal officials have determined that his cooperation has created a risk to him, he is in federal custody in the witness protection program. See 18 U. S. C. § 5003; Organized Crime Control Act of 1970, Title V, §§ 501–503 of the Act of Oct. 15, 1970, Pub. L. 91–452, 84 Stat. 933, note preceding 18 U. S. C. § 3481.

In July 1982, federal officials decided to transfer Beltran to another federal facility where he would remain in the witness protection program. On July 20, Beltran filed a complaint for declaratory relief and an application for a temporary restraining order in the Southern District of California. The District Court entered a temporary restraining order and set a hearing for the next morning. Between July 22 and July 30, the court held three hearings and received extensive briefs.

Beltran contended in the District Court that he would be in more danger at any other facility than at San Diego, in part because he would have to return to California to testify and the trips back and forth would be dangerous. He also claimed that he was entitled to remain in San Diego under the terms of his plea bargain with state officials. On July 30, the District Court denied a preliminary injunction. It ruled from the bench that Beltran had not demonstrated the requisite irreparable injury. Although there would be an added danger from the additional movement that the transfer would require, the court held that there was no indication that the federal officials charged with his movement would not take all necessary precautions, and that the added risk does not rise to immediate irreparable harm.

Beltran appealed to the Court of Appeals and sought a stay pending appeal. On July 30, the Court of Appeals granted a temporary stay and ordered the Government to file a response. On August 24, the Court of Appeals vacated its temporary stay, denied a motion for an injunction pending appeal, and denied a motion for a temporary stay pending application to this Court. Beltran's appeal from the denial of the preliminary injunction remains pending in the Court of Appeals.

Beltran has applied to me in my capacity as Circuit Justice for an emergency stay while his appeal to the Court of Appeals is pending. Beltran fears that he will be killed if he is transferred. He states that there is no guarantee that a new facility will offer him as much safety and security as his current location. Finally, Beltran claims that part of his security in his current location is based on his familiarity with prison personnel and inmates and that once he is moved he will be unable to return to the Metropolitan Correction Center in San Diego and enjoy the same degree of safety because the prison's population and personnel will change in the interim.

There is always a risk that Beltran will be attacked; this is why he is in the witness protection program. Although Beltran may be correct that that risk will be increased if he is moved, there is no indication that the officials responsible for the program will not continue to provide him with protection under the terms of the program. Beltran has not submitted to me any evidence sufficiently compelling to overcome the conclusion of the courts below that any increased risk he may bear does not rise to the level of irreparable injury. Indeed, Beltran's contentions are, in essence, that he is more comfortable and feels safer where he is than he would elsewhere. The Attorney General has authority to transfer Beltran from one facility to another in his discretion. 18 U. S. C. §4082(b). In the light of the conclusions of the District Court and the Court of Appeals, Beltran's claims are insufficient to justify me in interfering with the Attorney General's discretion to run the prison system. See generally *Bell* v. *Wolfish*, 441 U. S. 520, 562 (1979).

For these reasons, the application is denied.

CORSETTI *v.* MASSACHUSETTS

ON APPLICATION FOR STAY

No. A-226. Decided September 1, 1982

An application to stay, pending review on certiorari, the Massachusetts Supreme Judicial Court's judgment affirming applicant's conviction for criminal contempt and his 90-day sentence is denied. Although applicant has demonstrated that he will suffer irreparable harm, he has not demonstrated that the balance of equities in his favor is sufficient to overcome the strong doubt that certiorari will be granted or, in any event, that the judgment below will be reversed.

JUSTICE BRENNAN, Circuit Justice.

Applicant has applied to me for a stay, pending this Court's review on certiorari, of the judgment of the Massachusetts Supreme Judicial Court affirming applicant's conviction of criminal contempt in the Massachusetts Superior Court and of the 90-day sentence imposed for such contempt. 387 Mass. 1, 438 N. E. 2d 805 (1982).

The principles that control my determination as Circuit Justice of this in-chambers application were stated, in pertinent part, in *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers):

> "Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. . . . In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari . . . . Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was errone-

> ous. . . . Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. . . . And fourth, in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large."

My task is not to adjudicate this application on my own view of the merits of the federal questions presented, but rather to determine whether there is a "reasonable probability" that four Justices will consider the issues sufficiently meritorious to grant the petition of certiorari, and, if so, whether there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. Neither event can be predicted with anything approaching certainty, but nonetheless I have concluded that there is not a reasonable probability that certiorari will be granted, and that in any event there is not a fair prospect of reversal. Although applicant has demonstrated that he will suffer irreparable harm, he has not demonstrated that the balance of equities in his favor is sufficient to overcome my strong doubt that certiorari will be granted or, in any event, that the judgment will be reversed. Accordingly, the application is denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS 1979, 1980, AND 1981

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
Terms	1979	1980	1981	1979	1980	1981	1979	1980	1981	1979	1980	1981
Number of cases on dockets	23	24	22	2,509	2,749	2,935	2,249	2,371	2,354	4,781	5,144	5,311
Number disposed of during terms	1	7	6	1,982	2,227	2,390	1,828	2,021	2,037	3,811	4,255	4,433
Number remaining on dockets	22	17	16	527	522	545	421	350	317	970	889	878

	TERMS		
	1979	1980	1981
Cases argued during term	156	154	184
Number disposed of by full opinions	143	144	[1] 170
Number disposed of by per curiam opinions	12	8	[2] 10
Number set for reargument	1	2	4
Cases granted review this term	158	183	212
Cases reviewed and decided without oral argument	128	131	134
Total cases to be available for argument at outset of following term	78	102	126

[1] Includes No. 89 Original.

[2] Includes No. 81–89.

JULY 2, 1982

INDEX

ADMIRALTY. See **Constitutional Law,** VIII.

ADMISSION OF ALIENS TO STATE UNIVERSITY. See **Constitutional Law,** IX.

ADMISSIONS POLICIES OF UNIVERSITIES BASED ON SEX. See **Constitutional Law,** V, 5.

AIDERS AND ABETTORS AS SUBJECT TO DEATH PENALTY. See **Constitutional Law,** II.

ALCOHOLIC BEVERAGES. See **Constitutional Law,** III, 2; V, 2; **Intoxicating Liquors; Schools.**

ALIENS. See **Constitutional Law,** III, 1; IX.

ANTITRUST ACTS. See also **Intoxicating Liquors.**

Chiropractors' fees—Arrangement between insurer and chiropractic association—"Business of insurance."—In chiropractor's action alleging price-fixing violation of Sherman Act by an arrangement whereby insurance company used advice of chiropractic association's Peer Review Committee to determine reasonableness of a chiropractor's charges to, and necessity for his treatment of, company's health insurance policyholders, company's use of Peer Review Committee did not constitute "business of insurance" within meaning of § 2(b) of McCarran-Ferguson Act and thus was not exempt from antitrust scrutiny. Union Labor Life Ins. Co. v. Pireno, p. 119.

APPLE INDUSTRY. See **Standing to Sue.**

APPORTIONMENT OF CORPORATE INCOME FOR STATE TAXATION. See **Constitutional Law,** III, 3, 4.

APPRENTICESHIP PROGRAMS. See **Civil Rights Act of 1866.**

ARTICLE III JUDGES. See **Bankruptcy.**

ARTIFACTS FROM SUNKEN VESSELS. See **Constitutional Law,** VIII.

AT-LARGE ELECTIONS. See **Constitutional Law,** V, 1.

AUTOMOBILE SEARCHES. See **Constitutional Law,** VII.

BACKPAY LIABILITY FOR EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

BAD CHECKS. See **Criminal Law.**

BANKRUPTCY.

Bankruptcy Act of 1978—Judges—Art. III.—District Court's judgment dismissing action in a Bankruptcy Court by reorganization debtor seeking damages for defendant's alleged breach of contract and warranty, misrepresentation, coercion, and duress, based on District Court's conclusion that Bankruptcy Act of 1978 unconstitutionally conferred Art. III judicial power upon bankruptcy court judges, who lack life tenure and protection against salary diminution, is affirmed. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., p. 50.

BANKS. See **Criminal Law.**

BOYCOTT OF WHITE MERCHANTS BY BLACKS. See **Constitutional Law,** VI, 1.

BUSINESS OF INSURANCE. See **Antitrust Acts.**

BUSING OF STUDENTS. See **Constitutional Law,** V, 3, 4.

CABLE TELEVISION. See **Constitutional Law,** IV.

CALIFORNIA. See **Constitutional Law,** III, 2; V, 2, 4; **Home Owners' Loan Act of 1933; Intoxicating Liquors.**

CAPITAL PUNISHMENT. See **Constitutional Law,** II; **Stays,** 2.

"CHECK KITING." See **Criminal Law.**

CHILD CUSTODY. See **Habeas Corpus.**

CHILD PORNOGRAPHY. See **Constitutional Law,** VI, 2.

CHIROPRACTORS. See **Antitrust Acts.**

CIVIL RIGHTS ACT OF 1866.

Discrimination by union—Vicarious liability of employers and trade associations.—Liability may not be imposed under 42 U. S. C. § 1981 without proof of intentional discrimination, and in an action by a State and blacks representing a class of racial minorities against a local union, trade associations, and employers, alleging discrimination in operation of an exclusive hiring hall and of an apprenticeship program established by union and trade associations, District Court erred in imposing vicarious liability on defendant trade associations and employers on basis of union's discriminatory conduct, where court found discriminatory intent only on union's part and was unable to find any basis for imposing liability under doctrine of *respondeat superior;* District Court thus lacked power to allocate to trade associations and employers portion of costs of remedial decree. General Building Contractors Assn. v. Pennsylvania, p. 375.

CIVIL RIGHTS ACT OF 1964.

Discrimination in hiring—Tolling backpay liability—Seniority benefits.—An employer charged with discrimination in hiring can toll continuing accrual of backpay liability under § 706(g) of Act by unconditionally offering claimant job previously denied, and is not required to offer seniority retroactive to date of alleged discrimination. Ford Motor Co. v. EEOC, p. 219.

COLLATERAL ORDERS. See **Jurisdiction.**

COMMERCE CLAUSE. See **Constitutional Law,** I.

COMPULSORY PROCESS FOR OBTAINING WITNESSES. See **Constitutional Law,** III, 1.

CONSTITUTIONAL LAW. See also **Bankruptcy; Habeas Corpus; State Gross Receipts Taxes.**

I. Commerce Clause.

Ground water—Removal from State—Validity of Nebraska statute.—Commerce Clause is violated by a Nebraska statute conditioning grant of a state permit to transport ground water from any well in Nebraska for use in an adjoining State on latter's grant of reciprocal rights to transport ground water from that State for use in Nebraska. Sporhase v. Nebraska ex rel. Douglas, p. 941.

II. Cruel and Unusual Punishment.

Death penalty—Aiders and abettors.—Eighth and Fourteenth Amendments were violated by imposition, under Florida law, of death penalty upon petitioner, who was convicted as a constructive aider and abettor and hence a principal in first-degree murder, but who was not present at robbery and killings and did not intend that victims be killed or anticipate that lethal force would be employed during robbery. Enmund v. Florida, p. 782.

III. Due Process.

1. *Conviction for transporting illegal aliens—Deportation of alien witnesses.*—Respondent, who was convicted under a federal statute prohibiting knowing transportation of an alien who had entered country illegally within three years prior to date of transportation, failed to establish a violation of Fifth Amendment right to due process or Sixth Amendment right to compulsory process for obtaining witnesses on asserted ground that deportation of some of illegal aliens involved deprived respondent of opportunity to interview them to determine whether they could aid in his defense. United States v. Valenzuela-Bernal, p. 858.

2. *Regulation of alcoholic beverage importers—Validity of California statute.*—A California statute—providing that a licensed importer of alcoholic beverages shall not obtain any brand of distilled spirits unless he is

CONSTITUTIONAL LAW—Continued.

designated as an authorized importer of such brand by brand owner or his agent—does not violate Due Process Clause. Rice v. Norman Williams Co., p. 654.

3. *Taxation of corporations—Validity of Idaho law.*—Idaho may not, consistent with Due Process Clause, include within taxable income of a nondomiciliary parent corporation doing some business in State a portion of intangible income (dividends, interest payments, and capital gains from sale of stock) that corporation received from subsidiary corporations having no other connection with State. ASARCO Inc. v. Idaho State Tax Comm'n, p. 307.

4. *Taxation of corporations—Validity of New Mexico law.*—Due Process Clause was violated by New Mexico's income tax on portion of dividends received by parent corporation operating chainstores within State from its foreign subsidiaries operating chainstores in foreign countries, and by New Mexico's inclusion in parent corporation's income of fictitious sum never actually received from foreign subsidiaries but deemed by Federal Government to have been received by parent corporation for purposes of calculating its federal foreign tax credit, where each subsidiary operated a discrete business enterprise. F. W. Woolworth Co. v. Taxation and Revenue Dept., p. 354.

IV. Eminent Domain.

Cable television company—Installations on apartment buildings—Taking of landlord's property.—A New York statute requiring a landlord to permit a cable television company to install its facilities upon his property, and prohibiting landlord from demanding payment from company in excess of amount set by a State Commission, constituted a taking of a portion of appellant landlord's property for which she was entitled to just compensation under Fifth and Fourteenth Amendments, where cable television company had installed cables on landlord's apartment building to serve both landlord's tenants and other buildings. Loretto v. Teleprompter Manhattan CATV Corp., p. 419.

V. Equal Protection of the Laws.

1. *At-large electoral system for county commissioners—Discriminatory intent.*—In an action by appellee black citizens of Burke County, Ga., alleging that Fourteenth and Fifteenth Amendments were violated by at-large electoral system for county's Board of Commissioners that diluted blacks' voting power, Federal District Court—which held that although state policy behind electoral system was "neutral in origin," policy was being maintained for invidious purposes in violation of appellees' constitutional rights—applied proper standard requiring a determination of discriminatory intent; court's findings concerning intentional discrimination were not clearly erroneous, and it properly ordered that county be divided into districts for purposes of electing Commissioners. Rogers v. Lodge, p. 613.

CONSTITUTIONAL LAW—Continued.

2. *Regulation of alcoholic beverage importers—Validity of California statute.*—A California statute—providing that a licensed importer of alcoholic beverages shall not obtain any brand of distilled spirits unless he is designated as an authorized importer of such brand by brand owner or his agent—does not violate Equal Protection Clause merely because statute discriminates between designated and nondesignated wholesalers. Rice v. Norman Williams Co., p. 654.

3. *School desegregation—Busing.*—Equal Protection Clause was violated by a statewide initiative, passed by electorate, that (1) was drafted to terminate use of mandatory busing for purposes of racial integration of Washington's public schools, (2) prohibited school boards from requiring any student to attend a school other than one nearest or next nearest to student's home, and (3) permitted assignment of a student beyond such schools only for nonintegrative purposes. Washington v. Seattle School Dist. No. 1, p. 457.

4. *School desegregation—Busing.*—Fourteenth Amendment was not violated by amendment to California Constitution providing that state courts shall not order mandatory pupil assignment or busing unless a federal court would be permitted under federal decisional law to do so to remedy a violation of Equal Protection Clause. Crawford v. Los Angeles Board of Ed., p. 527.

5. *University's admissions policy—Exclusion of males from nursing school.*—Policy of petitioner state-supported university of denying otherwise qualified males right to enroll for credit in nursing school violates Equal Protection Clause, and exclusion of males cannot be justified under § 901(a)(5) of Title IX of Education Amendments of 1972, which exempts from § 901(a)'s general prohibition of gender discrimination in federally funded education programs admissions policies of public institutions of undergraduate higher education that traditionally admitted only students of one sex. Mississippi University for Women v. Hogan, p. 718.

VI. Freedom of Speech.

1. *Boycott of white merchants—Liability for merchants' business losses.*—Nonviolent elements of petitioner organizations' and individuals' activities in connection with a boycott and picketing of white merchants to obtain equality and racial justice were entitled to First Amendment protection, and thus petitioners were not liable in damages to respondent white merchants, under state law, for business losses resulting from petitioners' activities. NAACP v. Claiborne Hardware Co., p. 886.

2. *Child pornography—Validity of New York statute.*—First Amendment is not violated by a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under age of 16 by distributing material that depicts such a performance, as applied to respondent bookstore owner who was convicted for selling films depicting young boys

CONSTITUTIONAL LAW—Continued.

masturbating or as applied to others who distribute similar material. New York v. Ferber, p. 747.

VII. Searches and Seizures.

Automobile—Warrantless inventory search.—There was no violation of respondent's Fourth Amendment rights by warrantless search of his automobile, where (1) after car was stopped for a traffic violation, he was arrested for possession of open intoxicants and driver was issued a citation for not having a driver's license, (2) an inventory search, made before car was towed, disclosed marihuana in unlocked glove compartment and a loaded revolver in an air vent under dashboard, and (3) respondent was convicted in a Michigan state court for possession of a concealed weapon. Michigan v. Thomas, p. 259.

VIII. States' Immunity from Suit.

Sunken vessel—Ownership of artifacts.—In respondents' *in rem* federal-court action for declaration of title to sunken Spanish galleon that respondents had located off Florida coast and from which respondents had salvaged artifacts under contract with Florida state agency, Court of Appeals' judgment is affirmed insofar as it upheld District Court's determination that Eleventh Amendment did not bar court's seizure of artifacts from state officials' custody, but is reversed insofar as Court of Appeals, in affirming District Court's judgment, adjudicated Florida's claim of ownership of artifacts under salvage contract. Florida Dept. of State v. Treasure Salvors, Inc., p. 670.

IX. Supremacy Clause.

Nonimmigrant aliens—Denial of in-state status by state university.—University of Maryland's policy of categorically denying domiciled nonimmigrant aliens who hold G–4 visas (those issued to nonimmigrant aliens who are officers or employees of certain international organizations and to members of their immediate families) in-state status under which preferential treatment is given to domiciled citizen and immigrant alien students for purposes of tuition and fees, is invalid under Supremacy Clause. Toll v. Moreno, p. 1.

CONTEMPT. See **Stays,** 3.

CORPORATIONS. See **Constitutional Law,** III, 3, 4.

COUNTY COMMISSIONERS. See **Constitutional Law,** V, 1.

COURTS OF APPEALS. See **Jurisdiction.**

CRIMINAL LAW. See also **Constitutional Law,** II; III, 1; VII; **Jurisdiction; Stays,** 2, 3.

False statements to banks—"Check kiting."—Title 18 U. S. C. § 1014, which makes it a crime to knowingly make any false statement or report or

CRIMINAL LAW—Continued.

to willfully overvalue any land, property, or security for the purpose of influencing the action of certain financial institutions upon any application, advance, commitment, or loan, was not violated by petitioner's "check kiting" whereby he first drew a check far in excess of his account balance in one bank and deposited it in his account in another, and then reversed process between his accounts. Williams v. United States, p. 279.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law, II.**

CUSTODY OF CHILDREN. See **Habeas Corpus.**

DEATH PENALTY. See **Constitutional Law, II; Stays, 2.**

DEPORTATION OF ALIEN WITNESSES. See **Constitutional Law, III, 1.**

DESEGREGATION OF SCHOOLS. See **Constitutional Law, V, 3, 4.**

DISCRIMINATION AGAINST MEN. See **Constitutional Law, V, 5.**

DISCRIMINATION AGAINST NONIMMIGRANT ALIENS BY STATE UNIVERSITY. See **Constitutional Law, IX.**

DISCRIMINATION AGAINST PUERTO RICANS. See **Standing to Sue.**

DISCRIMINATION AGAINST WOMEN. See **Civil Rights Act of 1964.**

DISCRIMINATION BASED ON RACE. See **Civil Rights Act of 1866; Constitutional Law, V, 1, 3, 4; VI, 1; Standing to Sue.**

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1866; Civil Rights Act of 1964; Standing to Sue.**

DISCRIMINATION IN VOTING. See **Constitutional Law, V, 1.**

DISMISSAL OF INDICTMENTS. See **Jurisdiction.**

DISPROPORTIONALITY OF DEATH PENALTY FOR AIDERS AND ABETTORS. See **Constitutional Law, II.**

DISTRICT COURTS. See **Jurisdiction.**

DOMICILE OF NONIMMIGRANT ALIENS. See **Constitutional Law, IX.**

DUE-ON-SALE CLAUSES IN MORTGAGES. See **Home Owners' Loan Act of 1933.**

DUE PROCESS. See **Constitutional Law, III.**

EDUCATION AMENDMENTS OF 1972. See **Constitutional Law, V, 5.**

EDUCATION OF THE HANDICAPPED ACT.

Individualized instruction for handicapped children—Adequacy of state programs.—Act's requirement that a participating State must adopt a policy assuring all handicapped children right to a "free appropriate public education" is satisfied when State provides personalized instruction with sufficient support services to permit handicapped child to benefit educationally from that instruction, and under Act's judicial-review provisions a court must first determine whether State has complied with statutory procedures and then determine whether individualized program is reasonably calculated to enable child to receive educational benefits; Act did not require provision of sign-language interpreter in instant case for child with only minimal residual hearing. Board of Education of Hendrick Hudson Central School Dist. v. Rowley, p. 176.

EIGHTH AMENDMENT. See **Constitutional Law,** II.

ELECTIONS. See **Constitutional Law,** V, 1.

ELEVENTH AMENDMENT. See **Constitutional Law,** VIII.

EMINENT DOMAIN. See **Constitutional Law,** IV.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1866; Civil Rights Act of 1964; Seamen; Standing to Sue.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1866; Civil Rights Act of 1964; Standing to Sue.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** V.

EXCESSIVENESS OF DEATH PENALTY FOR AIDERS AND ABETTORS. See **Constitutional Law,** II.

EXPULSION OF STUDENT FOR INTOXICATION. See **Schools.**

FAIR TRIAL. See **Constitutional Law,** III, 1.

FALSE STATEMENTS TO BANKS. See **Criminal Law.**

FEDERAL ALCOHOL ADMINISTRATION ACT. See **Intoxicating Liquors.**

FEDERAL HOME LOAN BANK BOARD. See **Home Owners' Loan Act of 1933.**

FEDERAL SAVINGS AND LOAN ASSOCIATIONS. See **Home Owners' Loan Act of 1933.**

FEDERAL-STATE RELATIONS. See **Constitutional Law,** I; IX; **Education of the Handicapped Act; Habeas Corpus; Home Owners' Loan Act of 1933; Intoxicating Liquors; State Gross Receipts Taxes.**

FIFTEENTH AMENDMENT. See **Constitutional Law,** V, 1.

FIFTH AMENDMENT. See **Constitutional Law,** III, 1; IV.

FINAL DECISIONS. See **Jurisdiction.**

FIRST AMENDMENT. See **Constitutional Law,** VI.

FLORIDA. See **Constitutional Law,** II; VIII; **Stays,** 2.

FOURTEENTH AMENDMENT. See **Constitutional Law,** II; III, 2–4; IV; V; VI, 2.

FOURTH AMENDMENT. See **Constitutional Law,** VII.

FRAUDULENT CHECKING ACTIVITIES. See **Criminal Law.**

FREEDOM OF ASSEMBLY. See **Constitutional Law,** VI, 1.

FREEDOM OF ASSOCIATION. See **Constitutional Law,** VI, 1.

FREEDOM OF SPEECH. See **Constitutional Law,** VI.

GENDER-BASED DISCRIMINATION. See **Civil Rights Act of 1964; Constitutional Law,** V, 5.

GEORGIA. See **Constitutional Law,** V, 1.

GROSS RECEIPTS TAXES. See **State Gross Receipts Taxes.**

GROUND WATER. See **Constitutional Law,** I.

HABEAS CORPUS.

Termination of parental rights—State-court judgment—Federal habeas corpus relief.—Title 28 U. S. C. § 2254(a) does not confer jurisdiction on federal courts to consider petitioner mother's collateral challenge to Pennsylvania state-court judgment terminating mother's parental rights as to her sons whom she had placed in legal custody of respondent county agency, which in turn had placed them in foster homes—mother seeking federal habeas corpus relief for return of her sons to her custody and a declaration of invalidity under Federal Constitution of Pennsylvania statute under which her parental rights were terminated. Lehman v. Lycoming County Children's Services Agency, p. 502.

HANDICAPPED CHILDREN. See **Education of the Handicapped Act.**

HEALTH INSURANCE. See **Antitrust Acts.**

HIRING HALLS. See **Civil Rights Act of 1866.**

HOME OWNERS' LOAN ACT OF 1933.

Federal savings and loan associations—Due-on-sale clauses in mortgages—Pre-emption of state law.—A Federal Home Loan Bank Board regulation, authorized by Act, providing that a federal savings and loan association may include a clause in its loan instruments that permits association to declare balance of loan immediately due if property securing loan is sold or transferred without association's prior written consent, pre-empts conflicting state limitations on due-on-sale practices of such associations,

HOME OWNERS' LOAN ACT OF 1933—Continued.

and thus bars application to such associations of California rule limiting a lender's right to exercise a due-on-sale clause to cases where lender demonstrates that transfer of property impaired lender's security. Fidelity Federal Savings & Loan Assn. v. De la Cuesta, p. 141.

IDAHO. See **Constitutional Law,** III, 3.

IMMIGRATION AND NATIONALITY ACT OF 1952. See **Constitutional Law,** IX; **Standing to Sue.**

IMPORTERS OF ALCOHOLIC BEVERAGES. See **Constitutional Law,** III, 2; V, 2; **Intoxicating Liquors.**

INCOME TAXES. See **Constitutional Law,** III, 3, 4.

INDIAN COMMERCE CLAUSE. See **State Gross Receipts Taxes.**

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT. See **State Gross Receipts Taxes.**

INDICTMENTS. See **Jurisdiction.**

INSURANCE. See **Antitrust Acts.**

INTEGRATION OF SCHOOLS. See **Constitutional Law,** V, 3, 4.

INTERLOCUTORY ORDERS. See **Jurisdiction.**

INTERSTATE COMMERCE. See **Constitutional Law,** I.

INTOXICATING LIQUORS. See also **Constitutional Law,** III, 2; V, 2; **Schools.**

Importers—Authorization to obtain distillers' products—Validity of California statute.—A California statute—providing that a licensed importer of alcoholic beverages shall not obtain any brand of distilled spirits unless he is designated as an authorized importer of such brand by brand owner or his agent—is not invalid on its face as being pre-empted by, and unlawful under, either Sherman Act or § 5(a) of Federal Alcohol Administration Act, which prohibits a distiller or wholesaler from establishing exclusive retail outlets. Rice v. Norman Williams Co., p. 654.

INVENTORY SEARCHES OF AUTOMOBILES. See **Constitutional Law,** VII.

JUDGES. See **Bankruptcy.**

JURISDICTION. See also **Bankruptcy; Habeas Corpus.**

Court of Appeals—District Court's refusal to dismiss indictment—"Final decision."—Where, after respondents obtained a change of venue as to two-count federal indictment, Government secured a superseding indictment that added new counts but later voluntarily dismissed some of counts, District Court's denial of respondents' motion to dismiss remaining

JURISDICTION—Continued.

counts on asserted ground that superseding indictment manifested prosecutorial vindictiveness was not a "final decision" under 28 U. S. C. § 1291 and did not fall within "collateral order" exception to § 1291's rule of finality; thus, Court of Appeals lacked jurisdiction to review District Court's interlocutory order refusing to dismiss indictment. United States v. Hollywood Motor Car Co., p. 263.

JUST COMPENSATION CLAUSE. See Constitutional Law, IV.

LANDLORD'S RIGHT TO COMPENSATION FOR INSTALLATION OF CABLE TELEVISION FACILITIES. See Constitutional Law, IV.

LOS ANGELES. See Constitutional Law, V, 4.

MARITIME LAW. See Seamen.

MASSACHUSETTS. See Stays, 3.

MASTER'S LIABILITY FOR SEAMEN'S WAGES. See Seamen.

McCARRAN-FERGUSON ACT. See Antitrust Acts.

MIGRANT FARMWORKERS. See Standing to Sue.

MORTGAGE DUE-ON-SALE CLAUSES. See Home Owners' Loan Act of 1933.

MOTOR VEHICLE SEARCHES. See Constitutional Law, VII.

NEBRASKA. See Constitutional Law, I.

NEW MEXICO. See Constitutional Law, III, 4; State Gross Receipts Taxes.

NEW YORK. See Constitutional Law, IV; VI, 2.

NONIMMIGRANT ALIENS. See Constitutional Law, IX.

NURSING SCHOOL'S DISCRIMINATION AGAINST MEN. See Constitutional Law, V, 5.

OBSCENITY. See Constitutional Law, VI, 2.

PARENS PATRIAE SUITS. See Standing to Sue.

PARENT AND CHILD. See Habeas Corpus.

PENALTY FOR FAILURE TO PAY SEAMEN'S WAGES. See Seamen.

PENNSYLVANIA. See Civil Rights Act of 1866; Habeas Corpus.

PICKETING OF WHITE MERCHANTS BY BLACKS. See Constitutional Law, VI, 1.

PORNOGRAPHY. See **Constitutional Law,** VI, 2.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Home Owners' Loan Act of 1933; Intoxicating Liquors; State Gross Receipts Taxes.**

PRICE FIXING. See **Antitrust Acts.**

PRISONERS. See **Stays,** 1.

PROSECUTORIAL VINDICTIVENESS. See **Jurisdiction.**

PROTECTION OF WITNESSES. See **Stays,** 1.

PUERTO RICO. See **Standing to Sue.**

RACIAL DISCRIMINATION. See **Civil Rights Act of 1866; Constitutional Law,** V, 1, 3, 4; VI, 1; **Standing to Sue.**

REMOVAL OF GROUND WATER FROM STATE. See **Constitutional Law,** I.

RESPONDEAT SUPERIOR. See **Civil Rights Act of 1866.**

RIGHT TO VOTE. See **Constitutional Law,** V, 1.

SAFETY OF WITNESSES. See **Stays,** 1.

SALVAGE OF SUNKEN VESSELS. See **Constitutional Law,** VIII.

SAVINGS AND LOAN ASSOCIATIONS. See **Home Owners' Loan Act of 1933.**

SCHOOL DESEGREGATION. See **Constitutional Law,** V, 3, 4.

SCHOOLS. See also **Constitutional Law,** V, 3, 4; **Education of the Handicapped Act.**

Expulsion of student for intoxication—Construction of School Board's rule.—Where respondent student, who had been on school premises while intoxicated, was expelled for violation of petitioner School Board's rule providing for mandatory suspension for remainder of semester if a student has on school premises used "drugs," Board's interpretation of rule was reasonable, since alcohol is a "drug," and federal courts, in respondent's suit for injunctive relief, were not authorized to construe rule as not covering alcohol. Board of Ed. of Rogers, Ark. v. McCluskey, p. 966.

SEAMEN.

Wages—Penalty for delay in payment.—Under 46 U. S. C. § 596—which requires a master or owner of a vessel making coasting or foreign voyages to pay a seaman's unpaid wages within specified periods after his discharge and provides that a master or owner who fails to make payment "without sufficient cause shall pay" seaman a sum equal to two days' pay for each day that payment is delayed—imposition of penalty is mandatory for each day that payment is withheld in violation of § 596, and federal dis-

SEAMEN—Continued.
trict courts have no discretion to limit period during which penalty is assessed. Griffin v. Oceanic Contractors, Inc., p. 564.

SEARCHES AND SEIZURES. See **Constitutional Law,** VII.

SEATTLE. See **Constitutional Law,** V, 3.

SENIORITY RIGHTS OF EMPLOYEES. See **Civil Rights Act of 1964.**

SEX DISCRIMINATION. See **Civil Rights Act of 1964; Constitutional Law,** V, 5.

SEXUAL PERFORMANCES BY CHILDREN. See **Constitutional Law,** VI, 2.

SHERMAN ACT. See **Antitrust Acts; Intoxicating Liquors.**

SIXTH AMENDMENT. See **Constitutional Law,** III, 1.

STANDING TO SUE.

Discrimination against Puerto Ricans—Commonwealth's right to sue as parens patriae.—Puerto Rico has *parens patriae* standing to maintain federal-court action against petitioners, persons and companies engaged in apple industry in Virginia, alleging that petitioners had violated federal law by discriminating against Puerto Ricans in favor of foreign laborers with regard to temporary employment of crop pickers. Alfred L. Snapp & Son, Inc. v. Puerto Rico, p. 592.

STATE GROSS RECEIPTS TAXES.

Tax on Indian School Board's contractor—Validity of New Mexico law.—Federal law pre-empts New Mexico's tax imposed on gross receipts that appellant non-Indian construction company received from appellant tribal School Board for construction of a school for Indian children on reservation. Ramah Navajo School Board v. Bureau of Revenue of New Mexico, p. 832.

STATE INCOME TAXES. See **Constitutional Law,** III, 3, 4.

STATES' IMMUNITY FROM SUIT. See **Constitutional Law,** VIII.

STATE UNIVERSITY'S DISCRIMINATION AGAINST MEN. See **Constitutional Law,** V, 5.

STATE UNIVERSITY'S DISCRIMINATION AGAINST NONIMMIGRANT ALIENS. See **Constitutional Law,** IX.

STAYS.

1. *District Court judgment—Transfer of prisoner—Witness protection program.*—Application to stay District Court's judgment denying a preliminary injunction to prohibit federal officials from transferring applicant,

STAYS—Continued.

who was in federal custody under witness protection program, from one federal detention center to another, is denied. Beltran v. Smith (REHNQUIST, J., in chambers), p. 1303.

2. *Florida Supreme Court judgment—Death penalty.*—Application to stay Florida Supreme Court's judgment upholding applicant's murder conviction and death sentence, no execution date having yet been set, is denied. White v. Florida (POWELL, J., in chambers), p. 1301.

3. *State-court judgment—Criminal contempt conviction.*—Application to stay Massachusetts Supreme Judicial Court's judgment affirming applicant's criminal contempt conviction and his 90-day sentence is denied. Corsetti v. Massachusetts (BRENNAN, J., in chambers), p. 1306.

STUDENT'S EXPULSION FOR INTOXICATION. See **Schools.**

SUBSIDIARY CORPORATIONS. See **Constitutional Law,** III, 3, 4.

SUNKEN VESSELS. See **Constitutional Law,** VIII.

SUPREMACY CLAUSE. See **Constitutional Law,** IX.

SUPREME COURT.

1. Assignment of Justice Stewart (retired) to the United States Court of Appeals for the Ninth Circuit, p. 1117.

2. Term statistics, p. 1308.

TAKING OF PROPERTY BY INSTALLATION OF CABLE TELEVISION FACILITIES. See **Constitutional Law,** IV.

TAXES. See **Constitutional Law,** III, 3, 4; **State Gross Receipts Taxes.**

TELEVISION. See **Constitutional Law,** IV.

TOLLING BACKPAY LIABILITY FOR EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

TRANSFER OF PRISONERS. See **Stays.**

TRANSPORTING ILLEGAL ALIENS. See **Constitutional Law,** III, 1.

UNIONS. See **Civil Rights Act of 1866.**

UNIVERSITY'S DISCRIMINATION AGAINST MEN. See **Constitutional Law,** V, 5.

UNIVERSITY'S DISCRIMINATION AGAINST NONIMMIGRANT ALIENS. See **Constitutional Law,** IX.

VEHICLE SEARCHES. See **Constitutional Law,** VII.

VESSEL OWNER'S LIABILITY FOR SEAMEN'S WAGES. See **Seamen.**

VESSEL SALVAGE. See **Constitutional Law,** VIII.

VICARIOUS LIABILITY. See Civil Rights Act of 1866.

VOTING RIGHTS. See **Constitutional Law,** V, 1.

WAGES OF SEAMEN. See **Seamen.**

WAGNER-PEYSER ACT. See **Standing to Sue.**

WARRANTLESS SEARCHES OF AUTOMOBILES. See **Constitutional Law,** VII.

WASHINGTON. See **Constitutional Law,** V, 3.

WATER RIGHTS. See **Constitutional Law,** I.

WHOLESALERS OF ALCOHOLIC BEVERAGES. See **Constitutional Law,** III, 2; V, 2; **Intoxicating Liquors.**

WITNESS PROTECTION PROGRAM. See **Stays,** 1.

WORDS AND PHRASES.

1. *"Business of insurance."* § 2(b), McCarran-Ferguson Act, 15 U. S. C. § 1012(b). Union Labor Life Ins. Co. v. Pireno, p. 119.

2. *"Free appropriate public education."* §§ 602(18), 612(1), Education of the Handicapped Act, 20 U. S. C. §§ 1401(18), 1412(1). Board of Education of Hendrick Hudson Central School Dist. v. Rowley, p. 176.

3. *"Person in custody."* 28 U. S. C. § 2254(a). Lehman v. Lycoming County Children's Services Agency, p. 502.

U.S. GOVERNMENT PRINTING OFFICE : 1985 O - 379-728 : QL 3